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In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners*,

v.

PRINCE GEORGE CENTER, INC., ET AL., *Respondents*.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from a nation-wide class action brought in a state court on behalf of owners of buildings contaminated by asbestos. The suit against asbestos manufacturers sought the substantial costs of remediation. Class counsel settled 36,383 known potential claims for about $125 each and a requested $3.3 million in attorney's fees. Before settling, neither the class counsel nor the court inquired whether absent class members had filed actual lawsuits in other forums, which the settlement would extinguish. Consequently, they did not know that one of the class members, petitioner Prudential, for ten years had been vigorously litigating similar claims — valued at more than $110 million — in federal district court in New Jersey against the very same defendants. Counsel for those defendants knew, but kept silent.

Notice of the proposed class settlement was not sent to Prudential either at the contaminated properties at issue or at its last known and best address — its headquarters — even though Prudential's in-house counsel had informed the court of that best address in an opt-out form Prudential filed after learning of an earlier settlement class. Instead, notice was allegedly sent to five Prudential outposts that had no relationship to the contaminated properties at issue. No notice reached Prudential's headquarters or its counsel. Defense counsel finally informed Prudential of the class settlement, which ostensibly resolved Prudential's $110 million federal claims for a minuscule fraction of their worth, one day after the time for appealing it had expired.

The questions thus presented are:

1. Does the Due Process Clause's guarantee of adequate class representation in a suit for money damages require that, before settling a class action that will bind absent class members, class counsel must make a reasonable inquiry about the existence and value of the claims that the settlement purports to resolve?

2. Does the Due Process Clause mandate that notice and an opportunity to opt out of the class or the settlement must be sent to identifiable class members at their readily available addresses most likely to provide actual, timely notice of the settlement?

PARTIES TO THE PROCEEDING

The petitioners are The Prudential Insurance Company of America and two of its subsidiaries, PIC Realty Corporation and 745 Property Investors (collectively "Prudential").

The respondents are United States Gypsum Corporation, W.R. Grace & Co. — Conn., Asbestospray Corporation and United States Mineral Products Company (the relevant defendants in the class action), as well as Prince George Center, Inc. and MBL Life Assurance Corporation (the named class plaintiffs).

STATEMENT PURSUANT TO RULE 29.6

Prudential is a New Jersey-headquartered mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's non-wholly owned subsidiaries:

1. 745 Property Investments is owned 99% by Prudential and 1% by individual investors.

2. China Distri-Park Limited is 50% owned by PRICOA China (Warehouse) Limited and 50% owned by Trammell Crow International.

3. PRUCO, Inc. owns 1 share (<1%) of PruServicos Participacaoes, S.A.

4. Prudential Mortgage Asset Corporation II is 50% owned by Prudential and 50% owned by Inter-Atlantic Investment Advisors, Inc.

5. Prudential-Mitsui Trust Investments, Ltd is 50% owned by Prudential and 50% Mitsui Trust Investments, Ltd.

6. Prudential of America Life Insurance Company (Canada) is 75% owned by Prudential and 25% owned by 884904 Ontario, Inc.

7. Prudential Seguros S.A. is 99.99% owned by Prudential and .01% owned by Santiago Nicholson.

8. Prudential Towarzystwo Ubezpieczen na Zycie Spolka Akcyjna is 99.9998% owned by Prudential and .0001% owned by Ira Kleinman and .0001% owned by Tim Feige.

9. Prudential Private Capital Management, Ltd. (Cayman Islands) is a Private Equity Fund offering high net-worth investors the opportunity to invest in ARGUS, PRICOA, PAPEII, and the Prudential Brazilian Fund.

10. Preferred Coastal Realty, Inc. is 80% owned by The Prudential Real Estate Financial Services of America, Inc. and 20% owned by Alex Cramer.

11. Prudential Direct Insurance Agency of Ohio, Inc. is 90% owned by Prudential Direct, Inc. and 10% owned by Jeffrey Hess.

12. PBML Custodian Limited is 99.60% owned by Prudential Securities Group, Inc. and Prudential-Bache Securities (Australia) Limited, Bache Nominees Ltd., Corcarr Nominees Pty Limited, and Divsplit Nominees Pty Limited each own 10%.

13. Prudential-Bache International (Hong Kong) Limited is 50% owned by Prudential Securities Group, Inc. and 50% owned by Desmond Liu.

14. Prudential Commodities de Mexico, S, de R.L. de CV is 99.96% owned by Commodity Administrative Services, Inc. and .04% owned by Mexico Commodity Sourcing Corp.

15. Prudential-Bache Finance (Hong Kong) Limited is 50% owned by Prudential-Bache International (Hong Kong) Limited and 50% owned by Desmond Liu.

16. Prudential-Bache Futures (Hong Kong) Limited is 99.93% owned by Prudential-Bache International (Hong Kong) Limited and .07% owned by Desmond Liu.

17. Prudential-Bache Nominees (Hong Kong) Limited is 99.94% owned by Prudential-Bache International (Hong Kong) Limited and .06% owned by Desmond Liu.

18. Prudential-Bache Securities (Hong Kong) Limited is 99.99% owned by Prudential-Bache International (Hong Kong by Desmond Liu.

19. Prudential-Bache Metals GmbH & Co. KG is 98% owned by Prudential-Bache Securities (Germany) Inc. and 2% owned by Prudential-Bache Management GmbH.

20. Corcarr Nominees Pty Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% Divsplit Nominees Pty Limited.

21. Prudential-Bache Funds Management Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% by Corcarr Nominees Pty Limited.

22. Divsplit Nominees Pty Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% by Corcarr Nominees Pty Limited.

23. PruBache Nominees Pty Limited is 50% owned by Prudential-Bache Securities (Australia) Limited and 50% by Corcarr Nominees Pty Limited.

24. Bache & Co. S.A. de C.V. (Mexico) is 96% owned by Prudential Securities Incorporated, 3% owned by Thomas G. Sheridan and 1% owned by William L. Custard.

25. Lapine Holding Company is 66.7% owned by Prudential Securities, Inc. 28.3% owned by Kyocera Corp. and 5% owned by Kyocera (Hong Kong) Ltd.

26. The Prudential owns 6 shares (100%) of preferred stock in Prudential Timber Investments, Inc.

27. PAMA (Indonesia) Limited is 75% owned by Prudential Asset Management Asia Limited (BVI), 15% owned by BDNI and 10% by International Finance Corporation.

28. PAMA Ventura Indonesia is 65% owned by Prudential Asset Management Asia Limited (BVI), 20% owned by BDNI and 15% by International Finance Corporation.

29. Asian Infrastructure Mezzanine Capital Management Company Limited is 85% owned by Prudential Asian

Infrastructure Investors Limited (BVI) and 15% owned by Asian D[illegible]opment Bank.

PIC Realty Corporation is a wholly owned subsidiary of Prudential.

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PETITION FOR A WRIT OF CERTIORARI

The Prudential Insurance Companies of America, *et al.* respectfully petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is published at 704 A.2d 141. App. 2a. The opinion of the Court of Common Pleas, Philadelphia County, Civil Division is published at 33 Phila. 151 (1997). App. 21a. The orders of the Court of Common Pleas refusing to exclude Prudential from the class are unpublished. App. 67a, 68a. The order of the Supreme Court of Pennsylvania denying the petition for allowance of appeal is unpublished. App. 1a.

JURISDICTION

The order of the Pennsylvania Supreme Court denying leave to appeal was entered on December 8, 1998. On February 26, 1999, Justice Souter granted petitioners an enlargement of time to file this petition to and including April 22, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

In recent decisions, the Court has permitted state courts to entertain nation-wide class actions, provided that they adequately protect the federal constitutional rights of absent class members, including the rights to "adequate representation" and the "best practicable notice." See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Although the Court has expressed a "continuing interest" in elucidating the constitutional constraints on class action settlements that eliminate the damage claims of absent class members — granting writs of certiorari twice in recent years to

address the issue ((*Adams* v. *Robertson*, 520 U.S. 83, 92 n.6 (1997); see also *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994))) — it has not yet been able to do so.[1] This case presents an ideal opportunity for the Court to give content to the constitutional commands that absent class members receive "adequate representation" and the "best notice practicable" in suits that dispose of their damage claims.

This Petition involves two separate asbestos-property damage suits: (1) a class action in Pennsylvania state court from which this petition arises and (2) an action filed by Prudential to vindicate its own rights in the United States District Court for the District of New Jersey. Defendants have averred that there are eight buildings common to both actions. App. 28a.

1. ***The Pennsylvania Class Action.*** The Pennsylvania class action was filed in May 1986 against more than two dozen former manufacturers of asbestos-containing materials. App. 21a-22a. In April 1992, a class was certified, defined as:

> "Private owners of building(s) * * * which were leased or subleased in whole or part to the Federal Government or any agency, department or unit thereof, on or after May 30, 1986, in which buildings, asbestos-containing material is or was present." *Id.* at 22a.

No notice concerning that 1992 class certification was mailed to potential class members.

2. ***The New Jersey Action.*** In October 1987, having received no notice of the pendency of the Pennsylvania class action, Prudential filed suit in federal district court in New Jersey against seven former asbestos manufacturers. The suit sought to recover several hundred million dollars Prudential spent to abate defendants' asbestos in 61 buildings it owned throughout the United States. Prudential's claims were based on a federal statute, as well as New Jersey common and statutory law. The current active defendants in the New Jersey action are United States Gypsum Company, W.R. Grace & Co. — Conn., Asbestospray

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[1] The writs of certiorari in both cases were dismissed as improvidently granted. See *Adams* v. *Robertson*, 520 U.S. 83 (1997); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994).

Corporation and United States Mineral Products Company (collectively "the active defendants"). The defense counsel representing U.S. Gypsum and Grace in the New Jersey action are the same counsel who represent those same defendants in the Pennsylvania class action.

For nine years, the active defendants intensely litigated the New Jersey action without ever disclosing the existence of the Pennsylvania class action in which they also were defendants. Prudential has spent over $15 million in legal fees and litigation expenses prosecuting the New Jersey action.

3. ***The 1995 Settlement In The Pennsylvania Class Action.*** By early 1995, all the defendants in the Pennsylvania class action — except the four active defendants in Prudential's New Jersey case — had agreed to settle for $3.8 million. In February 1995, the Court of Common Pleas (1) decertified the class it had certified in April 1992, (2) certified an opt-out "settlement class" involving the settling defendants, and (3) conditionally certified a trial class involving the four non-settling active defendants. App. 23a-25a. Notice of certification of the class and settlement was directed to what defendants have described as "merely a hodgepodge of [incomplete] lists" of 36,383 potential class members, obtained by class counsel from the federal government pursuant to a Freedom of Information Act (FOIA) request for the addresses of buildings in which the government or its agencies lease space. Certain Defs. Supp. Mem. of Law In Support of Defs. Motion for "Opt-In" Procedure, at 9 (Jan. 22, 1993); App. 26a. Although the list included addresses of seven outlying Prudential offices, none had any connection to the contaminated properties at issue. None of these offices has any record of directly receiving notice. However, a copy of the notice was indirectly received by a Prudential office in Dallas, Texas — an office that was not on the notice list. The notice had been forwarded by an unrelated third party.

The Dallas office sent that notice to Prudential's legal department at its headquarters in Newark, New Jersey. A lawyer in the law department promptly filed with the Pennsylvania court the accompanying form excluding Prudential from the settlement class. On the exclusion form, Prudential identified Steven A. Lauer, Assistant General Counsel, as its representative agent and, in the space provided for the putative class member's address,

typed: "Law Department - 14th Floor, 751 Broad Street, Newark, New Jersey 07102-3777." App. 59a-60a. Prudential's counsel expressly noted on the form that the company acknowledged receipt, "but not service of," the notice (*id.* at 60a), because the only notice Prudential had received had not been addressed to it but instead had been forwarded by a third party.[2]

4. ***Continued Litigation In The New Jersey Action.*** Meanwhile, litigation of the New Jersey action was continuing. In December, 1995 Prudential moved for immediate separate trial of its claims relating to nine representative buildings. The active defendants opposed the motion. Pursuant to the parties' compromise, in March 1996 the federal court entered an order establishing a final pretrial schedule. *Id.* at 25a. Under this agreed order, Prudential voluntarily dismissed claims for over $30 million, reducing to 18 the number of buildings for which it would seek to recover remediation costs; and in exchange, the parties agreed to a trial by December 1996 on all issues pertaining to those 18 buildings. Aff. of Prudential's Counsel in Support of Petition, at 3 (Sept. 30, 1996).

Before negotiating that pretrial order and dismissal of Prudential's claims, the active defendants did not disclose that they already had agreed to settle the Pennsylvania class action on terms that they would later contend extinguished Prudential's claims as to 8 of the 18 remaining buildings.

5. ***The 1996 Global Settlement In The Pennsylvania Class Action And The Notice.*** By March 1996, the active defendants had arranged a settlement of the Pennsylvania class action under which they would pay a total of $7.8 million — from which class counsel are seeking $3.3 million in fees — in exchange for extinguishing all the related claims of all the class members, including unidentified claims class members were pursuing in separate lawsuits. In negotiating that settlement, defense counsel never disclosed the existence of the action Prudential — a putative class member — had been litigating against the defendants for nine years in New Jersey. And in accepting the settlement, class

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[2] Also in May 1995, a follow-up letter from Mr. Lauer to the Pennsylvania court and class counsel was prepared but not sent. App. 61a-62a.

counsel similarly did not ask defendants about, or investigate independently, the existence or value of other pending lawsuits that the settlement would extinguish. Brief of Trial Class Reps., at 1 n.1 (Superior Court Sept. 27, 1997). Indeed, lead class counsel later admitted that, when he agreed to settle the class's claims, he had no knowledge of Prudential's substantial claims or even that Prudential had a pending action. *Id.* Accordingly, in evaluating the fairness and adequacy of the proposed settlement, the Court of Common Pleas, too, lacked any knowledge of the existence or value of the claims the settlement was compromising. App. 53a.

The settlement included a customary "blow-out" provision, which allowed the defendants to avoid the settlement if 500 or more putative class members opted out. *Id.* at 10a. In February 1996, after entering a final class certification order, the Court of Common Pleas directed that notices of the proposed settlement be sent, along with forms permitting opt-out from this new settlement class, to the addresses class counsel had obtained from his FOIA request. *Id.* at 27a.[3] No effort was made to update that list with the address information contained in the exclusion forms filed with the court by the 356 class members who had opted out of the previous settlement class. Nor was any effort made to ensure that notice to the many corporations on the list was directed to their headquarters, general counsels, or responsible agents — the identities and addresses of which are readily available in numerous public directories.

The name "Prudential" or "Pru" appeared on the notice list six times, and there is one entry for "745 Property." Answer of Trial Class Plaintiffs to Petition of Prudential, Exh. B (Oct. 29, 1996). No defendant disclosed that a letter directed to those addresses for Prudential was far less likely to achieve actual notice than a letter directed to the address either of Prudential's headquarters or of its counsel in the New Jersey action. Defendants maintained silence even though they received the draft notice list well in advance of the mailing and even though they had committed in the settlement agreement to "cooperate in good faith, use their best efforts, and take all steps necessary to implement and effectuate" the provisions of the agreement, including its

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[3] In addition, the court approved publication of an abbreviated notice in eight newspapers and on the internet. App. 27a.

stipulation that "the class should receive notice." Settlement Agreements ("Notice and Approval of Settlement").

As a result, no notice was sent to Prudential at any of the buildings at issue in the New Jersey action. App. 5a, 6a. No notice was sent to Prudential's headquarters. *Id.* at 15a. And no notice was sent to Prudential's designated representative and counsel, Steven Lauer, who had identified himself as Prudential's agent in the opt-out form he filed with the court in 1995. Instead, seven notices were mailed to addresses of outlying Prudential buildings located in Boston, Chicago, Portland, Los Angeles, and Southfield, Michigan. The notices sent to Southfield and Los Angeles were returned by the Postal Service as "undeliverable." *Id.* at 6a. The record contains no evidence that any effort was made to redirect these notices to a correct address. And neither the Boston, Chicago, or Portland offices to which notice purportedly was sent, nor any other Prudential offices, have any record of receiving it. Aff. of Steven Lauer in Support of Petition, at 6-7 (Sept. 30, 1996).

While defense counsel did nothing to ensure that Prudential would receive notice of the settlement in time to opt out of it, they took exquisite care to ensure that the settlement would dispose of Prudential's claims in the New Jersey action. Defense counsel actively participated in drafting the notice and judgment, both of which emphasized that the settlement would bind absent class members who were litigating similar claims in other forums. Thus, Paragraph 24 of the notice explicitly states that class members (like Prudential) who "are already party to another lawsuit against [any of the defendants] * * * must nonetheless file an exclusion request." App. 27a-28a. The judgment likewise was crafted to bar all claims currently in litigation. *Id.* at 72a-73a.

The opt-out period for the 1996 class settlement with the active defendants in the Pennsylvania action ended on July 8, 1996. Prudential did not file an opt-out form because no responsible agent had received notice of the settlement. Shortly after the opt-out period closed, defense counsel received the list of the 289 putative class members who had filed opt-out forms. The next week, with the opt-out list in hand — which did not include Prudential — defendants filed a brief in support of the proposed settlement. In it, they expressly represented to the Pennsylvania

court that the damage claims of the class members that the settlement would resolve were likely "nominal." Mem. of Law of Settling Defs. In Support of Final Approval of Their Settlement Agreements, at 12 (July 19, 1996). The active defendants made that representation despite their knowledge that Prudential's claims in the New Jersey action for the eight common buildings alone exceeded $110 million. Their filing representing that the settlement was fair made no mention of the New Jersey action at all.

On August 13, 1996, having neither requested nor received any information about the existence or value of all the claims the global settlement purported to extinguish, the Pennsylvania court entered a Final Order and Judgment approving it. App. 53a-54a, 69a-76a.

6. ***Defendants' "Gotcha" Letter In The New Jersey Action.*** Exactly one day after the appeal period expired in Pennsylvania, at 5:02 p.m. on Friday, September 13, 1996, counsel for U.S. Gypsum and Grace faxed a letter to Prudential's counsel in the New Jersey action announcing the Pennsylvania class action settlement and the defendants' contention that it had extinguished Prudential's $110 million claims in the New Jersey action for the costs of remediating the eight common buildings. App. 77a-78a. Having received actual notice of the new class certification and settlement for the first time, Prudential's counsel promptly attempted to file an opt-out on September 20, 1996. *Id.* at 67a.

7. ***Prudential's Petitions And The Opinions Below.*** On September 30, 1996, Prudential petitioned the Pennsylvania Court of Common Pleas for a declaration that it was not a class member or that its September 20, 1996 opt-out was timely. In the alternative, Prudential argued that the notice and settlement violated its federal constitutional right to due process. Prudential challenged the constitutional adequacy of both the notice and the representation class counsel had provided. Pet. for Declaration That Prudential Is Not A Class Member Or, Alternatively, For *Nunc Pro Tunc* Ruling That Prudential's September 20, 1996 Opt-Out Filing Was Timely, at 23-29 (Sept. 30, 1996). Prudential acknowledged that it "kn[ew] so little about what has happened in the Class Action over the last decade" that it was unable to assess the adequacy of the representation in its totality pending fuller development of the facts. *Id.* at 28. But it argued that

> "any class representation which did not at least *take into account* the unique nature of its claim — a multi-million dollar suit which had already survived several motions to dismiss and is within a few months of trial — would fail the tests of [two state cases] * * *, both of which found inadequate representation." *Ibid.* (emphasis in original).

Expressly invoking the federal Due Process Clause, Prudential also argued that this Court in *Shutts*, *supra*, "held that either inadequate notice *or* inadequate representation deprive a class action plaintiff of due process." *Ibid.* (emphasis in original). Because it lacked full information concerning class counsel's conduct, and the court had not yet ruled on its motion to be excluded from the class or for its opt-out to be deemed timely, however, Prudential explicitly "reserve[d]" — twice — its right to make further arguments "concerning the issue of adequate representation." *Ibid.*; *id.* at 29.

On November 27, 1996, the court denied Prudential's petition without opinion. App. 67a. Prudential promptly petitioned for rehearing, reasserting, among other points, its constitutional challenges to the adequacy of both notice and representation. Brief of Prudential In Support of Petition for Reconsideration and Clarification (Dec. 10, 1996). With respect to the latter, Prudential again argued that class counsel's failure to "take[] into account" "Prudential's $300 million claim" in the New Jersey action prior to settling "is *prima facie* indication of inadequate representation." *Id.* at 28. Prudential noted again, however, that because it "was privy to virtually nothing that transpired in this case over the last decade, it needs discovery on the issue of the inadequacy of * * * representation." *Id.* at 29. "Among the items to be addressed would be how class counsel evaluated Prudential's claims" and defendants' "chances of avoiding a judgment" in the New Jersey litigation. *Id.* at 29 n. 10.

The Court of Common Pleas denied Prudential's motion for reconsideration and did not allow discovery. App. 68a. Several months later, after Prudential appealed to the appellate division of the Superior Court, the trial judge filed an opinion in support of his November order. *Id.* at 21a-66a. He addressed, but rejected, Prudential's due process arguments concerning both notice and

adequacy of representation. *Id.* at 54a-55a. The judge did not suggest that the representation issue had not been timely raised.

On November 21, 1997, a three-judge panel of the appellate court affirmed. *Id.* at 2a-20a. While it acknowledged that Prudential had raised a due process challenge to the adequacy of class counsel's representation, it refused to address that issue, mistakenly stating that the issue had been raised only in Prudential's petition for reconsideration. *Id.* at 7a-8a. The appellate court addressed but rejected Prudential's challenge to the constitutional adequacy of the notice (*id.* at 14a-18a), opining that Prudential's lack of awareness of the settlement was its own fault because it had "fail[ed] to monitor this litigation" (*id.* at 11a). It dismissed Prudential's argument that notice had not been the "best practicable" with a declaration that, under Pennsylvania law, Prudential was deemed to have received actual notice, because a letter had been mailed to its outposts. *Id.* at 15a. The appellate court also found that it was "eminently practical" for class counsel to use the old notice list without checking for better addresses in the more recent opt-out forms, reasoning that those opt-out forms had been filed by persons for whom the prior notice effort must have been adequate. *Id.* at 17a. On December 8, 1998 the Pennsylvania Supreme Court denied Prudential's petition for allowance of appeal to that court. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

I. THE ENORMOUS GROWTH OF NATION-WIDE CLASS ACTIONS IN STATE COURTS MAKES IT VITAL TO DEFINE THE CONSTITUTIONAL PROTECTIONS AGAINST UNFAIR OR COLLUSIVE SETTLEMENTS

Fleeing the increasingly skeptical environment of the federal courts, which have been faithfully employing Rule 23 to curb class action abuses,[4] class action lawyers are flooding the state courts, where state class action rules may receive less protective

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[4] See, *e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir. 1995).

interpretations.[5] Thus, commentators have reported a "doubling or tripling over the past several years of the number of putative class actions" filed in state courts. D. HENSLER, J. GROSS, E. MOLLER & N. PACE, PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

But in the absence of sufficiently specific constitutional constraints, the proliferation of state class actions has heralded a proliferation of abuses. See, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366-1382 (1995). The resulting chaos in the state courts is manifest. Widespread confusion and laxity reigns concerning the content of the Due Process protections to which absent class members are entitled, especially in the context of settlement. Collusion between class counsel and defendants seeking to buy peace is rampant. See *id.* at 1349-50, 1370-72.[6]

The desperate need for articulated standards constraining the conduct of class counsel in their representation of absent class

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[5] See, *e.g.*, *Class Action Lawsuits, 1998: Hearing On Mass Torts & Class Actions Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1998 WL 122533 (1998) (statement of John W. Martin); *Class Action Lawsuits, 1997: Hearing Before the Subcomm. on Admin. Oversight & The Courts of the Senate Judiciary Comm.*, 105th Cong., 1997 WL 680229, at *10 (Oct. 30, 1997) (statement of Lewis H. Goldfarb) (describing the "giant sucking sound" created by the "sudden, massive shift of class action lawsuits from the Federal Courts to local courts in certain southern states that have become class action havens"); Elizabeth Cabraser, *Trends and Developments in Mass Torts and Class Actions in Year One of the Post-Amchem Era*, SD 15S ALI-ABA 77, 98, 102 (1998) ("it is increasingly likely that the state courts will become the exclusive fora for the nationwide assertion of" certain types of class actions).

[6] See also, *e.g.*, *Class Action Lawsuits, 1997: Hearing Before the Subcomm. on Admin. Oversight & The Courts of the Senate Judiciary Comm.*, 105th Cong., 1997 WL 683686 (Oct. 30, 1997) (statement of John C. Coffee, Jr.); *id.* at 1997 WL 680229 (statement of Lewis H. Goldfarb); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" In Class Actions*, 73 N.Y.U. L. REV. 765, 775 (1998); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class & Derivative Actions*, 86 COLUM. L. REV. 669, 714 & n.121 (1986).

members is widely recognized. In one notorious recent example, class counsel settled an Alabama state court class action by depositors against the Bank of Boston for a maximum award of $9 per class member, plus $8 million in attorneys' fees, which were actually *debited* from the bank accounts of the putative class members, resulting in net losses for many of them. See *Kamilewicz* v. *Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, Wood, JJ., dissenting from denial of reh'g en banc), cert. denied, 520 U.S. 1204 (1997)). Outraged class members sued their "champions" from the state case for malpractice, but the federal courts dismissed for lack of jurisdiction. See *id.* at 1349.

Yet another form of class action abuse is the willful use of sloppy and outdated address lists. Too often, the failure to correct and update such lists is a convenient means by which class counsel and defense counsel protect their agreement from a deal-breaking number of opt-outs. The effect of that practice is to nullify the constitutional right to opt out of class action suits for money damages, recognized by the Court in *Shutts, supra*.

Endeavoring to address such state court class action abuses in the securities class action context, Congress conferred exclusive federal jurisdiction over certain securities suits against "listed" public companies. See *Securities Litigation Uniform Standards Act*, Pub. L. No. 105-353, 112 Stat. 3227 (Nov. 3, 1998) (codified as amended in sections of 15 U.S.C. §§ 77, 78, 80). But such Congressional preemption of the state courts is not always possible, nor in our federal system is it generally appropriate. Accordingly, there remains a need for this Court to ensure that absent class members in state cases will receive due process, by clarifying the applicable constitutional protections.

The Pennsylvania court's conclusions in this case — that class counsel had no duty to investigate the existence and value of the claims he was settling, and that notice to addresses known by the trial court and all counsel not to be the actual or best addresses of class members who they knew were likely to opt out — graphically illustrate the urgent need for definition of the rights to adequate representation and notice. Absent such guidance, there is an unacceptable risk that the state class action will become — as it

was in this case — a tool for cunningly destroying, rather than for rigorously vindicating, the rights of absent class members.

As we discuss in further detail below, review of the decision below is imperative. *First*, although it has long been settled that the Due Process Clause demands "adequate" representation of absent class members (*Shutts*, 472 U.S. at 812; *Hansberry* v. *Lee*, 311 U.S. 32, 42-43, 45 (1940)), and the Court has recognized in the federal context that adequate representation entails competent performance by class counsel (see *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982); *Amchem Prods.* v. *Windsor*, 117 S. Ct. 2231, 2251 n.20 (1997)), the Court has yet to articulate any standards for gauging the adequacy of the performance of class counsel.[7] As the results below demonstrate, the absence of such authority has led to confusion and error among state courts that simply do not appreciate the nature of the due process interests at stake. The need for such standards is especially urgent in the context of settlement, where inequitable "bargain[s]" too often are "proffered for [a court's] approval without benefit of adversarial investigation" (*Amchem*, 117 S. Ct. at 2235), the interests of "[a]bsent class members are * * * ignored," and inequitable pay-offs that benefit class counsel at the expense of their nominal clients are "crammed down the throats of objectors" (*Kamilewicz*, 100 F.3d at 1351-1352 (Easterbrook, J., dissenting from denial of reh'g en banc)). Unless this Court articulates class counsel's duty to investigate and disclose the existence and value of the claims they seek to settle, state courts will continue unwittingly to approve abysmally unfair settlements that extinguish absent class members' claims for fractions of their worth.

Second, although the Court has emphatically declared that identifiable class members are entitled to the "best practicable" notice (*Shutts*, 472 U.S. at 812), there is a pressing need to translate this general policy into specific guidance. The important issue is whether state courts and counsel seeking to settle the

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[7] The Court frequently has addressed the adequacy of representation provided to absent class members by class *representatives*. See, *e.g.*, *Amchem*, 117 S. Ct. at 2250-2251; *East Texas Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977); see also *Hansberry*, 311 U.S. at 42-43, 45. But the Court has never addressed the requirement of adequacy as it applies to class *counsel*.

claims of identified absent class members are obliged to select the notice procedure most likely to *give actual notice* by using or ascertaining the class members' *best, current addresses*. The issue is of overwhelming importance to courts and litigants, since the issues arise in virtually every class action. Lacking instruction from this Court, the decisions of the lower federal and state courts interpreting the "best practicable notice" mandate are in chaotic disarray. The result too often, as in this case, is that the constitutional right of identified class members to receive notice is sacrificed to class counsel's self-interested motive to minimize costs — and reduce the likelihood of a deal-breaking number of opt-outs — by commissioning a mass mailing to outdated and inaccurate addresses. It is highly important for this Court to confirm that the constitutional requirement that identified class members receive the best practicable notice, like the Rule 23 notice requirement, cannot "be tailored to fit the pocketbooks" of class counsel. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

II. DUE PROCESS DEMANDS REASONABLE INQUIRY INTO THE EXISTENCE AND VALUE OF ABSENT CLASS MEMBERS' CLAIMS

A. This Is A Troubling Issue That Recurs In State Court Class Action Litigation

The Court has repeatedly held, although only in general terms, that the Due Process Clause requires that absent class members receive "adequate" representation. *Shutts*, 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45); see also *Richards* v. *Jefferson County*, 517 U.S. 793, 800-801 (1996). Like other protections of absentees, that constitutional requirement demands "undiluted, even heightened, attention in the settlement context." *Amchem*, 117 S. Ct. at 2248. See also *Matsushita*, 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) ("stress[ing] * * * the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement").

The problem, though, is that the Court has not yet given that broad concept the kind of hard-edged content that prevents lower

courts from tolerating shoddy representation by class counsel and acquiescing in collusive settlements, to the detriment of absent class members. What happened here is anything but unique.

Defendants have a powerful incentive in *every* class action to endeavor to resolve, through a global settlement, all similar claims pending against them in *every* forum. And naturally, defendants try to negotiate that global settlement at the lowest possible cost. In a truly adversarial system, that incentive of defendants to use a state-court class action settlement to eliminate cheaply the viable claims class members are pursuing in other forums would be counterbalanced by plaintiffs' counsel's incentive to obtain the highest possible settlement for his clients. Properly motivated plaintiffs' counsel therefore would increase his negotiating power by arraying his own ammunition — amassing evidence of the high value of *all* the class members' claims — in support of a high settlement demand.

The problem, as a host of commentators and courts have observed, is that the class action procedure too frequently is *not* truly adversarial. See, *e.g.*, John C. Coffee, Jr., *Class Actions: Interjurisdictional Warfare*, 218 N.Y.L.J. 5 (Sept. 25, 1997); sources cited *supra* n. 6. Motivated by the prospect of receiving even *higher* fees if he agrees to sell his clients' claims cheaply, class counsel often declines to inquire into the existence and/or value of claims in other forums that the settlement would extinguish. Cf. RAND STUDY, *supra*, at 24 (the willingness of class counsel *not* to engage in discovery — which could readily reveal the existence of similar, valuable pending claims — is frequently a *quid pro quo* for a settlement with "attractive fees").

Often, as in this case, the most critical play in the game is the failure of the state court to which the global settlement is proffered to inquire about the claims it would extinguish. For why else would a state court approve the bargain basement sale of the valuable claims of absent class members, unless it had "never been apprised by the parties of the existence of the first proceeding"?

Interjurisdictional Warfare, *supra*, at 5.[8] The scene is replayed again and again.[9] Plaintiffs' counsel declines to investigate, for to do so may reveal the inadequacy and unfairness of the settlement to which he has agreed, scuttle the deal and deprive him of his (often disproportionately substantial) fees. Defense counsel declines to disclose, since disclosure would alert the court and class counsel to the need for actual notice to (and hence make possible opt-outs by) the class members whose separate claims defense counsel is trying to bar by *res judicata*. As Judge Easterbrook has put it:

> "The [class] lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."

Kamilewicz, 100 F.3d at 1352. See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

The end product, in a nutshell, is this case. Plaintiffs, having expended millions of dollars and years of effort pursuing their substantial claims, are suddenly informed by defendants that those claims have been unalterably extinguished for a small fraction of a penny on the dollar, in a settlement of which they had received no notice, by class counsel who, while purporting to protect their interests, professes ignorance of their claims.

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[8] Cf. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.29, at 333 (1995) ("In mass tort litigation, collecting information about past, pending, and future claims is integral to reviewing settlement."); RAND STUDY, *supra*, at 26 ("virtually all of those * * * interviewed agreed that a key factor facilitating questionable settlements is that judges are not consistently exercising their responsibility to scrutinize" them).

[9] See, *e.g.*, *Walter Johnson* v. *Norwest Fin. Alabama, Inc.*, No. CV-93-PT-0962-S, Mem. Op. at 2-3 (N.D. Ala. Dec. 9, 1996) (defendants had secretly brokered an Alabama state court settlement in a copy-cat class action without informing either court until a tentative agreement had been reached); *In re Federal Skywalk Cases*, 97 F.R.D. 370 (W.D. Mo. 1983).

B. The Pennsylvania Court's Decision Is Irreconcilable With Decisions Of The Lower Federal Courts; And Guidance By This Court Is Urgently Required

1. The Pennsylvania Court of Common Pleas rejected Prudential's argument that, by settling its claims for a nominal sum without first inquiring into their "nature or magnitude" — indeed, with no cognizance of their existence — class counsel provided patently inadequate representation. App. 54a-55a. The court reasoned, illogically, that because in the court's view the "defendants had no duty to advise plaintiffs' class counsel" of lawsuits class members were pursuing against the defendant in other forums, class counsel did not breach his own duty by failing to inquire into the existence of such suits before compromising them away. *Id.* The appellate court affirmed. App. 7a-8a. The Pennsylvania courts' interpretation of the Due Process Clause is irreconcilable with decisions of the lower federal courts.

Most notably, it conflicts directly with the recent decision by the Ninth Circuit in *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (1997) (on remand from *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996)). In that case, Delaware counsel representing a state-court class of shareholders entered a global settlement of the shareholders' state and federal claims. This Court held that the Delaware court's judgment settling the class action, which included the federal claims over which the state court had no jurisdiction, could not, for that reason alone, be denied full faith and credit by other courts. *Matsushita*, 516 U.S. 367. In her concurrence, however, Justice Ginsburg pointedly observed that the due process challenge to the adequacy of representation — including the argument that class counsel in the state case had "undervalued the federal claims" (*id.* at 398) — "remain[s] open for airing on remand"(*id.* at 399).

Taking this cue, the Ninth Circuit thereafter concluded that the judgment had been entered without due process. The Ninth Circuit condemned the flagrantly inadequate representation class counsel had rendered by, among other things, settling the federal claims "at a bargain basement price" without first accurately ascertaining the value of the claims the putative class members were pursuing in a federal court. 126 F.3d at 1249. In stark contrast to the Pennsylvania court below, the Ninth Circuit concluded that, by

"completely fail[ing] to investigate or develop their federal claims and basically 'roll[ing] over' during settlement negotiations," class counsel engaged in conduct that "fell far short of the representation that due process requires." *Id.* at 1251.[10]

2. It is imperative that the Court confirm that such passive participation by class counsel in defendants' efforts to extinguish the valuable claims of absent class members violates the right to "adequate" representation. The Court has recognized the constitutional requirement that absent class members receive adequate representation "at all times" (*Shutts*, 472 U.S. at 812), and, in the Rule 23 context, that adequate representation includes competent performance by class counsel (*Amchem*, 117 S. Ct. at 2251 n.20; *Falcon*, 457 U.S. at 157 n.13). Monitoring by the courts of the adequacy of representation is especially important because absent class members are, by definition, not present and therefore unable to perform the task. But the Court has never articulated any specific standards for class counsel's performance.

It is an issue about which the lower courts have evinced marked confusion. A majority of courts eschew the ethics rules by which attorneys ordinarily are bound, declaring them inapplicable to the relationship between class counsel and absent class members. See, *e.g.*, Susan P. Koniak, *Through The Looking Glass Of Ethics And The Wrong With Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 15 & n. 53 (1995) (citing cases); *In re General Motors*, 55 F.3d at 801 (observing that the adequacy of representation in "class actions cannot be analyzed in the same

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[10] The Pennsylvania courts' decision also conflicts with *Romstadt* v. *Apple Computer, Inc.*, 948 F. Supp. 701, 703, 708 (N.D. Ohio 1996). There, as in *Epstein*, the federal court held that the failure by defense counsel and class counsel to disclose to a state court the existence of pending federal claims that would be resolved by a proffered settlement deprives putative class members of due process. Indeed, in contrast to the Pennsylvania courts, the *Romstadt* court insisted that defendants *do* have a duty to advise the trial court to which they are presenting a settlement of a class member's pending separate lawsuit. *Compare* App. 54a-55a *with* 948 F. Supp. at 704-706. The court explained that the nondisclosure of such critical information ultimately deprives the state judge "of the ability to inquire about the adequacy of representation" and "the reasonableness and fairness of the terms of settlement." *Id.* at 705-706.

[ethics] framework as conventional bipolar litigation"). Commentators have decried the absence of any clear standards to fill the void. See, *e.g.*, *Through The Looking Glass*, *supra*, at 15 (in class actions, "the standard used by courts is not only lower than the malpractice standard ordinary lawyers are held to, the standard is nonexistent"); Susan P. Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Prods.*, 80 CORNELL L. REV. 1045 (1995); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 316-317 (1985). They observe that courts often tolerate conduct by class counsel in brokering settlements that, if engaged in by non-class attorneys, would be deemed shockingly unethical malpractice. See Susan P. Koniak, *Under Cloak of Settlement*, 82 VIRGINIA L. REV. 1051 (1996).

Lacking specific guidance, many courts reduce the inquiry into the adequacy of counsel's representation to a cursory, one-time initial check of counsel's experience. See, *e.g.*, *Hoban* v. *USLife Credit Life Ins. Co.*, 163 F.R.D. 509, 514 (N.D. Ill. 1995); *Mashburn* v. *National Healthcare, Inc.*, 684 F. Supp. 660, 672 (M.D. Ala. 1988). "As long as class counsel has any experience in the area of law covered by the class action * * *, he is presumed to be adequate." *Through The Looking Glass*, *supra*, at 16-17 & n. 53. A few courts have carefully examined the vigor and competence with which class counsel have pursued their cases prior to and during settlement. See, *e.g.*, *Epstein*, 126 F.3d at 1248-1255; *In re General Motors*, 55 F.3d at 801-804. But, as this case demonstrates, clear, consistent standards by which class counsel's performance will be measured are lacking.

This case thus presents an ideal opportunity to clarify the extent to which, as a matter of minimal due process, class counsel must investigate the existence and value of class members' actual claims and disclose that information to a court when presenting a settlement. Establishing suitably clear criteria for lower courts to use in evaluating "adequate" representation will deter the flagrant misuse of class actions and legitimize the finality of judgments.

C. The Pennsylvania Court's Decision That Class Counsel's Representation Was Constitutionally Adequate Was Erroneous And The Issue Is Properly Framed For Review

1. The decision of the Pennsylvania courts upholding the adequacy of representation here was wrong as a matter of due process. That class counsel in this case did not vigorously protect the interests of the class in this case is an extravagant understatement. Class counsel readily conceded that he lacked any knowledge that Prudential possessed damage claims at all, let alone claims for over $110 million. Brief of Trial Class Reps., at 1 n.1 (Superior Court). Had he engaged in the most minimal inquiry, he could not have helped but to discover them. A one-line discovery request served on defense counsel — "Identify all pending actions against your clients involving their manufacture of asbestos-containing materials, including the names and best addresses of the plaintiffs and the amounts they are claiming" — would have elicited the information handily. Indeed, defense counsel, traveling between the two adjacent litigations in Pennsylvania and New Jersey, likely had had to bite their tongues more than once to resist the urge to blurt out a disclosure.

Alternatively, a two-minute Westlaw or Lexis search would have unearthed the claims: the New Jersey action already had resulted in two published opinions. See *Prudential Ins. Co.* v. *U.S. Gypsum Co.*, 711 F. Supp. 1244 (D.N.J. 1989); *Prudential Ins. Co.* v. *U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir. 1993). Counsel also could have asked the defendants for an affidavit containing the relevant information as a prerequisite to settlement. Rather than engaging in that minimal inquiry, class counsel simply settled 36,383 claims of unknown value for $125 a piece and a comparatively lavish $3.3 million in claimed counsel fees. The conclusion that the fees were the motivating factor is inescapable.

Class counsel's willingness to blind himself to the unfairness of his treatment of absent class members was surpassed only by that of the Pennsylvania courts. While the opinions below pay lip service to the adequacy of representation, they engage in no serious assessment of that constitutional requisite.

Thus, this case provides the Court with the important opportunity to declare that due process specifically demands

competent negotiation of a settlement and that constitutional competence requires some reasonable effort to appreciate and compare the value of the rights dissolved with the value of the benefits obtained in exchange. See *Epstein*, 126 F.3d at 1251; see also FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995) (identifying factors court should take into account in evaluating settlement, including value of claims resolved). Indeed, this Court itself has warned of the dangers of a class action "bargain proffered for [a court's] approval without benefit of adversarial investigation." *Amchem*, 117 S. Ct. at 2235. Accordingly, the Court should insist that adequate representation demands such "adversarial investigation" of the claims that class counsel and defense counsel are proposing to extinguish. *Id.*

2. Prudential properly raised and preserved the issue of the constitutional inadequacy of class counsel's representation, and the appellate court erred in refusing to reach it. The appellate court's decision was predicated upon its belief that the argument had been "pursued initially in Prudential's petition for reconsideration." App. 7a-8a. That belief was demonstrably false. Prudential raised and argued the issue in *both* its initial Petition to the Court of Common Pleas *and* its Petition for Reconsideration filed with the same court; indeed, it did so to exactly the same degree, and invoking the same authorities, in both briefs. See *supra*, pp. 7, 8.[11] Prudential raised and argued the issue again in its notice of appeal and opening appellate brief. Compare *Adams* v. *Robertson*, 520 U.S. 83 (1997). Because, as a factual matter, it is indisputable that Prudential actually raised and argued its federal claim in its initial papers, there can be little debate that Prudential presented

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[11] When Prudential raised this constitutional objection in its initial petition for relief, it explained that its lack of familiarity with the history of the Pennsylvania class action proceedings precluded it from addressing the adequacy of representation in its totality, and requested an opportunity to engage in discovery and present further argument on the issue at a later time. See *supra*, pp. 7-8. The appellate court did *not* hold that Prudential's "reservation" of part of its argument in that manner constituted waiver; instead, the appellate court mistakenly asserted that Prudential had never raised the issue at all. This sole reason for declining to reach Prudential's argument was simply wrong.

it to the State courts with "'fair precision and in due time.'" *Id.* at 88 (quoting *New York* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).

This Court has repeatedly held that a state court's erroneous decision to side-step a properly framed federal issue will not insulate it from this Court's review. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988); *Wright* v. *State of Georgia*, 373 U.S. 284, 289-290 (1963). Just last month, the Court held that when, as in this case, a state court predicates its refusal to reach an issue upon a blatant factual error, its refusal does not provide an "adequate state ground" that can bar a litigant from obtaining review by this Court. *South Central Bell Tel. Co.* v. *Alabama*, 119 S. Ct. 1180, 1185 (1999). The same analysis compels the conclusion that this Court is entitled to use this case to determine that due process requires class counsel to conduct a reasonable evaluation of the pending claims of absent class members before agreeing to settle them.

III. THE "BEST PRACTICABLE" NOTICE ENTAILS NOTICE TO THE BEST AVAILABLE ADDRESSES

Even if the representation had been adequate in this case, that would not excuse the deficiency in the notice procedure used. Due process dictates that identifiable absent class members in suits for money damages receive *both* adequate notice *and* adequate representation. See *Shutts*, 472 U.S. at 812 (identifying notice and representation as cumulative requirements); see also *Richards*, 517 U.S. at 801; *Eisen*, 417 U.S. at 176-177. See generally Patrick Woolley, *Rethinking The Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

A. The Question Of What Constitutes "Best Practicable" Notice Has Overwhelming Importance

The Pennsylvania appellate court acknowledged that the Federal Constitution requires that notice of a proposed class settlement must be the "best practicable," but ruled that this obligation is satisfied by notice to addresses *known* by the trial court and all counsel *not to be the best addresses* of absent class members. This ruling is irreconcilable with the Court's prohibition in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950), against "process which is a mere gesture"

or "a feint." Yet it is unfortunately representative of the laxity with which the lower courts often apply the constitutional mandate of "best practicable notice" articulated in that case and its progeny.

The Court has visited the issue of the constitutional adequacy of notice in a wide variety of *individual actions*. In that context, it has ruled, for example, that (1) "'reasonably diligent efforts'" must be undertaken to "ascertain" the would-be recipient's best address, *Tulsa Prof. Collection Servs., Inc.*, v. *Pope*, 485 U.S. 478, 491 (1988) (quoting *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 798 n.4 (1983)); (2) notice must be sent to the best address of which the sender has actual knowledge, *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); and (3) notice must be sent to the guardians of individuals who would be unable to appreciate its legal significance, *Covey* v. *Town of Somers*, 351 U.S. 141, 145-146 (1956).

Here again, however, the lack of precise guidance about how to translate these principles into the context of *class actions* has left the door ajar to pervasive abuse. Since *Mullane*, a decision rendered almost half a century ago, the Court has provided little instruction on how courts in representative actions should ensure that absentees receive notice. It reiterated fifteen years ago in *Shutts* that class notice must be the "best practicable, 'reasonably calculated * * * to apprise interested parties of the pendency of the action.'" 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-315). And it held in *Eisen* that Rule 23 forbids a court to "tailor" the individual notice requirements "to fit the pocketbooks of particular plaintiffs" and class counsel. 417 U.S. at 176.[12] But the Court has not yet delineated the specifics of the constitutional requirement that absent class members receive the "best practicable" notice.

Left with the responsibility of giving content to that somewhat opaque standard, the lower federal and state courts habitually emphasize the "practicability" of notice over its quality. In the unwieldy nation-wide class actions over which state and lower

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[12] The Court has recognized that the mandatory notice provision of Rule 23 was "'designed to fulfill requirements of due process.'" *Eisen*, 417 U.S. at 173-174 (quoting *Rules Advisory Comm. Notes to Fed. R. Civ. P. 23*).

federal courts are being asked to preside, efficiency and cost-savings trump the Court's directive that the court and parties exercise "due diligence" to ensure that notice to identified class members be given in a manner that is "reasonably certain" to reach them. *Mullane*, 339 U.S. at 315. By failing to adopt procedures designed to ensure accurate direction of notices, these decisions undermine the foundation on which the right to opt out is premised: the assumption that class members will actually learn that a court is adjudicating their claims. See *Shutts*, 472 U.S. at 811-812.

Judicial leniency concerning notice procedures is especially dangerous in light of the incentives both class counsel and defense counsel have to *minimize* the number of class members who actually receive notice. The more class members who receive notice, the more opt-outs; the less favorable the deal for defendant; the more likely a "blow-out" provision, like the one to which the parties agreed in this case, will be triggered; and the less likely class counsel will get their fees. Moreover, representative plaintiffs (or their counsel) are generally required to pay the costs of notice. See *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978). Not surprisingly, that reverse incentive system rarely stimulates class counsel to engage in strenuous efforts to ensure actual notice. Accordingly, proof-of-claim rates typically are appallingly low. See generally 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS App. 8-4 (3d ed. 1992) (Tables of Response Rate Levels) (documenting proof of claim rates as low as 0.28%).

The appellate court's approval of the notice procedure in this case is symptomatic of the trend. The court sustained a mass mailing to an old notice list without *any* effort (1) to use the addresses that class members who previously had opted out — and hence were most likely to opt out again, if given notice and an opportunity — had filed with the court; (2) to ensure that notice to corporate class members was directed to responsible officers or agents; or (3) to research addresses of class members whose notices were returned as undeliverable. As the decision below illustrates, clarification from the Court of the malleable "best practicable" notice standard is essential.

These issues are of immense importance, arising in virtually every class action and affecting their fundamental fairness. This case presents an excellent opportunity to remind the lower courts that, even in the class action context, "the Constitution recognizes higher values than speed and efficiency." *Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973) (internal quotation marks omitted).

B. Lower Courts Interpret "Best Practicable" Notice Inconsistently

The lower courts have demonstrated marked confusion about whether class action notice procedures must include efforts to ascertain the *best* addresses of class members, *i.e.*, those most likely to result in actual receipt. Some courts require extensive efforts to ascertain the correct addresses of identifiable class members, *e.g.*, *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098-1099 (5th Cir. 1977), and exclude class members to whom notice could not be delivered, *e.g.*, *Shutts* v. *Phillips Petroleum Co.*, 679 P.2d 1159 (Kan. 1984), *aff'd in part and rev'd in part*, 472 U.S. 797 (1985). Others hold that the direction of notices to incorrect addresses is not a procedural deficiency so unreasonable as to render the notice unconstitutional, *e.g.*, *Peters* v. *National R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992); *Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla.1995); *Trist* v. *First Federal Savings & Loan Ass'n*, 89 F.R.D. 1, 2 (E.D. Pa. 1980) (notice directed to several thousand incorrect and expired addresses, and not directed at all to 37 class members, found unproblematic). And many courts tolerate exceedingly high percentages of "undeliverables" without demanding further efforts to ensure actual notice, *e.g.*, *Burns* v. *Elrod*, 757 F.2d 151, 153 (7th Cir. 1985) (deeming "adequate" notice to addresses on a 10-year-old list, even though 500 of the 700 notices were returned as undeliverable); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) (no supplemental notice required even though notice had failed to reach one third of the class members).

Thus, as one authority on class actions has observed, there is a "conflict in the lower federal courts" regarding "the proper construction of the requirement for 'the best notice practicable under the circumstances.'" 2 NEWBERG ON CLASS ACTIONS, *supra*, § 8.02, at 8-5. See also George Rutherglen, *Better Late Than*

Never: Notice & Opt Out at the Settlement Stage of Class Actions, 71 N.Y.U. L. REV. 258, 264 (1996) ("It remains uncertain * * * exactly what kind of notice the Due Process Clause requires."); *id.* at 266 (same). This case offers the Court an opportunity to confirm that, even in the class action context, (1) the "best practicable notice" *always* entails use of the *best addresses* in the court's and class counsel's possession; (2) notice to a company or corporation generally must be directed to its headquarters or an agent likely to comprehend its significance; and (3) due process demands reasonable efforts to use accurate addresses when the stakes are high.

C. The Notice Procedures Adopted By The Court In This Case Were Not The "Best Practicable" Because They Were Not Designed To Achieve Actual Notice

While the standards for "best practicable" notice require clarification, under any standard it is plain that the notice provided to Prudential violated elementary notions of fairness. Notice in representative actions is the "best practicable" only if "[t]he means employed [are] such as one desirous of *actually informing* the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315 (emphasis added). The chosen method must either be "*reasonably certain* to inform those affected" or, "where conditions do not reasonably permit such notice, * * * the form chosen [must not be] substantially less likely to bring home notice than other of the feasible and customary substitutes." *Ibid.* (emphasis added). The method chosen in this case was neither.

Notice calculated actually to *inform* class members who had opted out of the first settlement class of the new settlement would have been sent to the addresses they had provided in their first opt-out forms (unless they had since filed a more recent address with the court). In Prudential's case, the address its counsel had provided in its prior opt-out form was also, not coincidentally, the location of its headquarters.[13] These were the addresses actually

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[13] The 1995 opt-out form included a space specifically requesting that opt-outs provide their addresses. See App. 60a. Prudential's representative, Steve Lauer, did exactly that. See *id.* The obvious effect of the court's request for an address was to lead class members to believe that, if they provided an address, the court would use it.

"at hand" (*Mullane*, 339 U.S. at 318), contained in the court's and counsel's own files. The trial court's failure to direct notice to the addresses provided in earlier opt-out responses was especially egregious because those class members who already had chosen once to exclude themselves from the proceedings were among the most likely to opt out again, if given a real chance to do so.

To excuse what was done here, the Pennsylvania appellate court simply incanted a familiar refrain: the failure of either class counsel or the trial court to check the addresses provided by the 356 class members who previously had filed opt-out responses was "eminently practical." App. 17a. But when class members' best addresses are at hand, "practicability" simply is not a relevant constraint. *Mullane*, 339 U.S. at 318 (where "the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely * * * to apprise them" that their rights are about to be finally adjudicated). A secretary or paralegal could have substituted the few hundred opt-out "best addresses" contained in the court's own records in a few hours. In any event, the "practicability" standard is not a license to use whatever notice method demands the *least* effort. Rather, it demands "*due diligence*" to ascertain the addresses most likely to result in actual notice. *Mullane*, 339 U.S. at 317 (emphasis added). See also *Mennonite*, 462 U.S. at 798 n.4. Reference to the court's own records to ascertain the best addresses of likely opt-outs required little diligence — it simply demanded common sense and elementary fairness.[14]

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[14] The appellate court also reasoned that updating the addresses of the class members who had opted out was unnecessary because they had all somehow received notice of the earlier settlement class. But, like Prudential, they may have learned of the class action only through serendipity, rather than through accurate individual notice. The court and class counsel had a duty to ensure that these class members who had earlier opted out — and who provided specific "best addresses" for further proceedings — would receive the "best notice practicable" of any further development affecting their rights. Cf. 2 NEWBERG ON CLASS ACTIONS, *supra*, § 8.18, at 8-64 ("[i]f the parties or the court have become aware of the names or addresses of absent class members who have not previously been sent individual notice, due process may mandate that these class members also receive individual notice of settlement").

Even apart from its failure to require class counsel to avail himself of the information in the court's records, the trial court's notice method was deficient. Due Process demands that the notice method be tailored to the nature of the class and the needs of the intended recipients, in a manner that will best ensure, to the extent practicable, *actual* receipt and comprehension. See *id.*; *Amchem*, 117 S. Ct. at 2252 (expressing doubt that class action notice whose significance cannot be appreciated is constitutionally adequate); *Robinson*, 409 U.S. at 39-40 (notice sent to legal, correct address is constitutionally inadequate, when State knew that individual would not receive it there); *Covey*, 351 U.S. at 145-147 (notice sent to legal address of a person known to be unable to comprehend its significance is constitutionally inadequate).

In this case, all parties were aware that many class members were corporate or commercial entities. It is well-established that "reasonable notice" to a corporation is notice directed "to an officer or an agent whose position in the organization indicates that there is a high probability that the papers will reach those persons in the organization responsible for protecting the firm's interests in the litigation." 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1074, at 460 (2d ed. 1987). See also *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928). Here, notice to persons "responsible for protecting the firm's interests in the litigation" (*id.*) could readily have been accomplished by directing notice to the company's headquarters. It is self-evident that the court's notice, directed instead to outlying addresses of the multi-national company, which had no nexus at all to the subject of the notice, was not calculated to apprise it of the subject of the action.[15]

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[15] The misdirection of the notice to corporate outposts was especially egregious in light of the fact that the notice failed to identify with specificity the buildings to which it purportedly pertained. As defendants themselves had explained regarding the similar prior notice, "the Notice fails adequately to inform recipients of whether they are actually in the class, and if so, what buildings or parts of buildings are at issue." Certain Defs. Mem. in Opp. to Pltfs. Motion for an Order Approving Class Notice, at 6 (June 18, 1993). As a result, the recipient of the notice might not have intuited that the notice pertained *neither* to the building to which it was actually directed *nor* to the buildings managed by the office at that location, *but instead* to entirely different buildings.

Such generalized notices are not reasonably calculated to provide a large corporation with practical, actual notice in time to allow responsible managers and counsel to take effective action to protect the corporation's interests. See *Greene* v. *Lindsey*, 456 U.S. 444, 452 (1982) ("In determining the constitutionality of a [notice] procedure, * * * 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.'") (quoting *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283 (1925)). With "due diligence" and little expenditure of effort, class counsel could readily have acquired the addresses of the corporate headquarters or agents of class members by consulting a corporate directory, available in any library, or by performing a search in the on-line databases of secretaries of state. Compare *Eisen*, 417 U.S. at 175 ("reasonable effort" must be expended to identify names and addresses of class members).

Misreading this Court's decision in *Shutts*, the appellate court opined that no such minimal effort was necessary, reasoning that absent plaintiff class members are not entitled to the same accuracy of notice as are non-resident defendants. App. 16a. But the Court's observation in *Shutts* that "the Due Process Clause * * * does not afford [absent plaintiffs] as much protection from state-court jurisdiction as [such defendants]" concerned *jurisdiction*, not notice. 472 U.S. at 811. That comment does not buttress the appellate court's conclusion that class members are entitled only to cavalier notice. To the contrary, in *Shutts* the Court suggested that the standard for gauging the constitutional adequacy *of notice* in class actions, where an absent class member may be divested of his claim, is *identical* to the standard in forfeiture actions and similar proceedings against defendants. *Compare Shutts*, 472 U.S. at 812 (invoking *Mullane* standard as governing notice in class actions) *with Robinson*, 409 U.S. at 39-41 (invoking the same *Mullane* standard in forfeiture case); *Schroeder* v. *City of New York*, 371 U.S. 208, 213 (1962) (same in condemnation proceeding); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956) (same). The conclusion is inescapable: in *all* cases in which an individual's "constitutionally recognized property interest" is at stake — here, a class member's "chose in action" for civil damages — the Constitution demands a notice procedure reasonably calculated actually to apprise the individual of the threat that its interest will be "forever" "extinguish[ed]." *Shutts*, 472 U.S. at 807.

The appellate court's holding (App. 17a) that it would be excessively burdensome to require class counsel "to identify the actual location" of the clients whom he was purporting to represent is especially untenable in light of the magnitude of the stakes in this case. Notice is a functional concept. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 15 n. 15 (1978) ("[d]ue process is flexible and calls for such procedural protections as the particular situation demands") (internal quotation marks omitted). When the threatened deprivation is great, the process to which an individual is entitled is more substantial. See, *e.g.*, *Matthews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (a determination of the process due demands consideration of the "interests that are affected"); see also *Greene*, 456 U.S. at 451 (in light of the "significant interest" at stake, better notice was due). Even if a search for the proper addresses of corporations might not be warranted in a case in which minute sums are at stake -- itself a dubious proposition, *see Eisen*, 417 U.S. at 176 — it certainly was in this case, where the claims were for the recovery of remediation costs that could (and in Prudential's case do) reach hundreds of millions of dollars.[16]

The appellate court's suggestion that the destruction of Prudential's multi-million dollar claim was its own fault, because it had "fail[ed] to monitor this litigation" is spurious. App. 11a. This Court's views on this thesis could not be clearer: *absent class members have no duty to monitor*. "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Shutts*, 472 U.S. at 810; see also *Matsushita*, 126 F.3d at 1242-1244; *Gonzales* v. *Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973). Two of those safeguards, of course, are reasonable

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[16] The essential unfairness of the notice procedure used in this case was compounded by defendants' decision not to alert the court and class counsel that the notice would likely be inadequate to alert Prudential to the impending danger to the claims it was actively litigating against defendants in federal court. Meantime, defendants continued to litigate Prudential's New Jersey case vigorously, "implying by their silence that the * * * action[was] unaffected by the class adjudication," and lulling Prudential into complacency. *McCubbrey* v. *Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 68 (N.D. Cal. 1976).

notice and an opportunity to opt out. *Shutts*, 472 U.S. at 811-812. Thus, Prudential's knowledge that a proceeding "was taking place in the court" did not impose upon it any "duty * * * to inquire * * * about possible court orders" restricting its rights. *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953). Instead, Prudential had "a right to assume that * * * 'reasonable notice' [would] be given" to it "before [its] claims are forever barred." *Ibid.*; see also *Mennonite*, 462 U.S. at 800. That right was not altered by Prudential's status as a commercial entity: "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Id.* at 799. In sum, the Pennsylvania appellate court's decision warrants immediate correction.

CONCLUSION

The Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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APRIL 1999

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION on behalf of themselves and all others similarly situated	:	No. 637 Eastern District Allocatur Docket 1997
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
UNITED STATES GYPSUM COMPANY, ET AL.,	:	
Respondent	:	
Petition of: PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA	:	

ORDER

PER CURIAM:

AND NOW, this 8th day of December, 1998, the Petition for Allowance of Appeal is hereby **DENIED.**

TRUE COPY FROM RECORD

Attest: DEC 8, 1998

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION, On Behalf of Themselves and All Others Similarly Situated	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, W.R. GRACE & CO.-CONN., U.S. MINERAL PRODUCTS CO. and ASBESTOSPRAY CORPORATION	:	No. 0531 Philadelphia, 1997
APPEAL OF: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PIC REALTY CORPORATION and 745 PROPERTY INVESTMENTS (Collectively "PRUDENTIAL")	:	

Appeal from the Order dated November 27, 1996, docketed December 2, 1996, Court of Common Pleas, Philadelphia County, Civil Division, at No. May Term, 1986 No. 5388.

BEFORE: BECK, JOHNSON and MONTEMURO, JJ.:

OPINION BY JOHNSON, J.:

FILED NOV 21, 1997

In this appeal we consider whether the notice procedure employed, in a class action conducted in accordance with the Pennsylvania Rules of Civil Procedure was constitutionally sufficient to bind an absent plaintiff class member. We also consider whether the vigorous litigation between an absent plaintiff and the same defendants in a parallel out-of-state action requires the absent plaintiffs' exclusion from the class of settling plaintiffs after entry of final judgment. We conclude that the notice afforded the Prudential Insurance Company of America (Prudential) satisfied the requirements of due process. We also conclude that the distinguished trial judge acted entirely within his discretion in denying Prudential's petition for exclusion from the plaintiff class or, in the alternative, a determination that its opt-out notice was timely. Accordingly, we affirm the order denying Prudential's petition and supplement thereto.

This class action was instituted May 30, 1986, by Peter Kalkus, an owner of Virginia office buildings, on behalf of owners of office buildings having United States Government tenants, against an array of asbestos manufacturers. On April 18, 1990, Prince George Center, Inc. intervened as class representative after Kalkus's claim was ruled barred by a Virginia statute of repose. On April 16, 1992, the Philadelphia Court of Common Pleas certified the class as follows:

> . . . private owners of buildings (within the District of Columbia and the fifty United States) that were leased or subleased in whole or in part to the Federal Government or any agency, department or unit thereof, on or after May 30, 1986, in which buildings, asbestos containing material was or is present.

Memorandum and Order, Kremer, J., dated April 16, 1992; R.R., Vol. I, at 268a. Notice of this order was never required. On May 7, 1993, the court ordered this action to proceed on an opt-out basis, as provided in Pa.R.Civ.P. 1711(a).

By early 1995, twenty-four of the twenty-eight non-bankrupt defendants in this action had executed settlement agreements with plaintiffs' counsel, contingent upon court approval. Settlement funds totaling $3,782,400 and a cash rebate program had been advanced. To facilitate court approval of these settlements, the court decertified the plaintiff class in February 1995, and certified a settlement class. The court conditionally certified a separate trial class, pursuant to Pa.R.Civ.P. 1710(d), to continue the litigation against the four non-settling defendants. The new classes were defined as:

> . . . a Settlement Class consisting of all private owners of any building or buildings in the United States that were leased or subleased in whole or in part to the federal government or any agency, department or unit thereof at any time between May 30, 1984 and December 22, 1994, inclusive, in which building(s) asbestos or asbestos-containing materials were present.

And:

> . . . a Plaintiff Class for purposes of trial consisting of all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994, inclusive, (1) leased or subleased their building(s) in whole or in part to the United States or any agency thereof; and, (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by U.S. Gypsum and/or U.S. Mineral Products Company and/or W.R. Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy with him/her or it to misrepresent

or withhold from the public, knowledge of the hazards of asbestos.

Amended Order, Bonavitacola, J., dated February 17, 1995, at ¶¶ 2, 4, attached as Exhibit G to Affidavit of Prudential's Counsel in Support of Petition for Declaratory Relief.

In October 1987, Prudential, as an owner of commercial buildings, sued the trial class defendants in the United States District Court for the District of New Jersey. Prudential's claim was for damages incurred and to be incurred as a result of asbestos in its buildings. By stipulation of the parties, on March 26, 1995, this suit was limited to eighteen Prudential buildings.

In February 1995, the Pennsylvania trial court ordered that notice of the settlements and their terms be sent to the settlement class and scheduled a hearing for objections and approval of the settlements for May 19, 1995. Class members could opt out of the settlement class by filing a written election with the court by April 18, 1995. A summary notice of the settlement was published twice in the Wall Street Journal and eight major metropolitan newspapers. A more detailed notice was sent by first class mail to 36,383 potential class members appearing on a list compiled by the General Services Administration and the United States Postal Service which contained the names and addresses of federal agency landlords. Prudential was identified as the owner of seven properties on this list and notices were mailed to each. None of these properties were involved in Prudential's New Jersey litigation.

On April 28, 1995, Steven A. Lauer, a member of Prudential's house counsel staff, executed the form to opt out of the settlement class on behalf of Prudential. On May 10, 1995, Robert Gilson, counsel to Prudential, drafted a letter to the Philadelphia Prothonotary for Lauer's signature indicating that Prudential did not want to be a member of any future class in the Prince George Center, Inc. action unless

Lauer received notice and filed an affirmative election to participate. This letter was never sent.

By April 1996, the four remaining defendants in this action had executed settlement agreements. The trial court ordered that notice be given and that an approval hearing be held July 24, 1996. Exclusion requests were to be filed by July 9, 1996. Notice was disseminated in May 1996 to the same addresses as the earlier settlement notices, advertised in the same newspapers as the earlier notice, posted on the internet, and announced in five trade publications. The notice of settlements with the trial defendants stated:

> If you are already a party to another lawsuit against Grace, U.S. Gypsum, U.S. Mineral and/or Asbestospray not involving personal injury, you must nonetheless file an Exclusion Request; otherwise, you will be bound by the Settlement Agreement and the Final Judgment Order, and your lawsuit will be enjoined.

Notice of Proposed Settlements, Bonavitacola, J., dated April 24, 1996, at ¶ 24, attached as Exhibit L to Affidavit of Prudential's Counsel in Support of Petition for Declaratory Relief. Seven notices were sent to the same Prudential buildings as the earlier notice, and the Post Office returned two of these as undeliverable.

Prudential did not return an exclusion request, nor did it appear at the July 24 hearing. 289 members of the trial class opted out of the settlement, an important number since Grace and Gypsum had reserved the right to rescind the agreement if 500 exclusion requests were received. The court approved the settlements at the hearing and judgment was entered in favor of the four defendants on August 13, 1996. The settlement required $7,740,000 to be paid into the fund established by the twenty-four defendants who had settled previously. The judgment served as a release of the four defendants from any claims that were or could be asserted by the remaining class members and limited those plaintiffs' recoveries to the settlement fund.

Immediately after the appeal period for this judgment expired, the four trial class defendants informed Prudential's New Jersey counsel of the August 13 judgment, claiming that it applied to eight of the buildings involved in the New Jersey litigation. On September 30, 1996, Prudential petitioned the trial court for a declaration that it was not a class member. This petition was denied on November 27, 1996. Prudential petitioned for reconsideration on December 10, 1996. The trial court declined to reconsider this order on December 17, 1996, and this appeal followed.

Prudential raises multiple issues in this appeal. Initially, it argues that the trial court erred in including Prudential as a class member without affording it notice consistent with due process. Prudential also argues that the trial court erred in determining that it was a member of the trial class because it had provided timely and effective notice to the defendants of its intent to opt out of the trial class. Prudential further argues that the trial court abused its discretion in denying equitable relief from the judgment on the facts presented.

Prudential also makes broad attacks on the certification of the trial class and the approval of the settlements reached between the class representative and the trial class defendants. Prudential challenges the adequacy of the settlements and class counsel's representation of its interests. It also claims the certification of the trial class was improper under the Pennsylvania Rules of Civil Procedure. Finally, Prudential argues that the conduct of the trial class defendants in obtaining the settlements was fraudulent, and that they have taken positions in related litigation which estopped them from opposing Prudential's petition.

The trial class defendants responded with a motion to quash this appeal except the single issue challenging the trial court's discretion in refusing to allow Prudential to belatedly exclude itself from the trial class. This Court will only consider those issues properly raised in Prudential's petition filed September 30, 1996, and disposed of by the trial court's

order of November 27, 1996, to wit: whether the notice afforded Prudential was constitutionally adequate; whether pending litigation altered Prudential's status as a class member; and whether the trial court abused its discretion in refusing to grant Prudential relief from this judgment. The remaining arguments were pursued initially in Prudential's petition for reconsideration. This Court has no jurisdiction over a trial court's denial of a petition for reconsideration. *Estate of Merrick*, 432 Pa. 450, 454, 247 A.2d 786, 787-88 (1968); *Seibel v. Allstate Insurance Co.*, 346 Pa.Super. 384, 392, 499 A.2d 666, 670 (1985); *Provident Nat'l Bank v. Rooklin*, 250 Pa.Super. 194, 378 A.2d 893 (1977). We hold that the issues raised initially in Prudential's petition for reconsideration are similarly beyond the scope of our jurisdiction and we decline to consider them in this appeal. *See* Pa.R.A.P. 302(a).

Prudential argues that its vigorous devotion of time and resources to the prosecution of the New Jersey litigation during and beyond the time in which it was required to affirmatively seek exclusion from the trial class constituted a de facto withdrawal from that class. Prudential further argues that because counsel for the trial class defendants was the same in both the Pennsylvania and New Jersey actions, the defendants were estopped from asserting that Prudential did not withdraw from the class.

Essentially, Prudential petitioned the trial court to declare that its continued litigation in New Jersey was effective to exclude it from the settlements. Prudential styles this issue one of first impression in Pennsylvania. The nature of the procedure utilized by the trial court for determining class membership undermines this view of the facts.

In Pennsylvania all class members are plaintiffs in the action upon the filing of the complaint. *Allessandro v. State Farm Mut. Auto. Ins. Co.*, 487 Pa. 274, 279 n.9, 409 A.2d 347, 350 n.9 (1979). A trial court is empowered to require

parties wishing to be excluded from a particular class to file of record, by a specific date, "a written election to be excluded from the class." Pa.R.Civ.P. 1711(a). The United States Supreme Court has sanctioned the use of this "opt-out" procedure for all types of class action plaintiffs, explaining "If . . . the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or thought about filing suit, and should be fully capable of exercising his right to 'opt out.'" *Phillips Petroleum Co. v. Shutts*, 272 U.S. 797, 813 (1985).

Prudential was aware of the existence of this action and the proper method for extricating itself from it. Indeed, it utilized the form provided with the notice of the first proposed settlement to decline participation in that settlement. Prudential admits that it received professional advice on this aspect of the litigation and had a letter drafted which would have avoided the possibility of it unwittingly being bound to any future judgment in this case. Prudential cannot now claim that its continued litigation of another decade-old suit against the same defendants, not limited to the claims subject to this action, was intended as a sufficient notification of its desire to exclude itself.

The prevailing federal view is that pending litigation is no substitute for compliance with judicially ordered exclusion procedures. *See In re Prudential Securities Litigation*, 164 F.R.D. 362, 370 (S.D.N.Y. 1996), *aff'd* 107 F.3d 4 (2d Cir. 1996); *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 513, *aff'd per curiam*, 490 F.2d 1183, 1186 (2d. Cir. 1974). *See also In re National Student Marketing Litigation*, 530 F.2d 1012, 1015 (D.C. Cir. 1976) (fact of pending litigation by particular plaintiffs raised no requirement of specific, additional notice relating to opt-out procedures). *But see McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 68-69 (N.D. Cal. 1976) (because notice was not specific as to effect of settlement on pending litigation nor explicitly mandated exclusive opt-out

procedure, failure to affirmatively opt-out was no bar to continued litigation in separate forum). A contrary Pennsylvania rule is not desirable. When numerous similar claims exist, parallel litigation will likely be the rule, not the exception. A prime purpose of the class action is to promote judicial economy by reducing the amount of duplicative litigation in our courts. Further, defendants are often willing to settle with a class representative for the very reason that they hope to gain relief from otherwise endless litigation instituted by similarly situated plaintiffs. The trial class defendants manifested that desire, in this case, by explicitly bargaining for a 'blow-out' provision, which would have enabled them to avoid the settlement if five hundred potential individual claimants filed exclusion requests. We hold that a pending lawsuit is not effective to exclude a party from a class action conducted under Pa.R.Civ.P. 1711(a).

Accordingly, this Court must merely decide whether the trial court acted within the limits of its discretion when it declined Prudential's petition in equity to afford it relief from its own failure to avoid a judgment entered against it.

Generally, petitions for relief from judgments are addressed to the sound discretion of the trial court. *See, e.g., Sklar v. Harleysville Ins. Co.*, 526 Pa. 617, 619, 587 A.2d 1386, 1387 (1991); *Castings Condominium Ass'n v. Klein*, 444 Pa.Super. 68, 72, 663 A.2d 220, 223 (1995). A trial court abuses its discretion when it misapplies the law, or when its decision is "manifestly unreasonable" and not a mere error in judgment. *Castings Condominium, supra.*

The standards guiding a trial court's discretion in opening default judgments provide a useful yardstick for assessing the trial court's order. This Court has emphasized that a balancing of the prejudice to the respective parties is the essence of such an equitable decision. *See Provident Credit Corp. v. Young*, 300 Pa.Super. 117, 129-31, 446 A.2d 257, 263-64 (1982) (en banc). We have clarified, however, that a court will not weigh competing claims of

prejudice unless the party seeking such equitable relief first establishes that he or she moved promptly to cure their default and that a reasonable excuse for the default existed. *Castings Condominium*, *supra*, at 77, 663 A.2d at 225. This standard applies when a defendant seeks relief from a monetary judgment entered without benefit of adversary proceedings. Certainly no lesser standard should apply in a case such as this, where the defendant obtains the judgment under attack in exchange for a substantial settlement payment.

We decline to take issue with the trial court's determination that Prudential offered no reasonable excuse for its failure to timely act. Prudential had notice of the substance of this action in April 1995. It obtained the advice of counsel and was presumably aware of the ramifications of a failure to opt out of the action. It is undisputed that further notice, specifically concerning the instant settlement, was delivered to five separate Prudential properties in May 1995. Prudential has offered no explanation as to how these notices failed to reach any responsible person in its organization as the first notice apparently did, nor does Prudential adequately explain its failure to monitor this litigation after filing its exclusion request relating to the first settlement. Instead, Prudential relies on the failure of its opponents to affirmatively advise it that the clock was running. This Court has refused to recognize a litigant's obligation to cure an opponent's unilateral mistake. *See id.* at 75-76, 663 A.2d at 224 (party seeking relief from default judgment cannot rely on opponent's silence as a reasonable excuse for its own mistake regarding necessity of action). *Accord*, *Supermarkets General Corp*, *supra*, at 514 (the district court rejected a heightened notice requirement in cases of pending litigation, explaining that "[t]he failure of the internal procedures of the plaintiff to see that the notice reached the proper person is no excuse"). The author of a leading treatise on class actions offers this advice:

> Plaintiffs who have previously instituted an independent action are not automatically excluded as potential members of a subsequently filed class action that is upheld by the court, so counsel who file individual actions should consider entering an appearance in the class action in order to secure essential court papers, particularly the Rule 23(c)(2) notice, which contains the option for exclusion.

HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 16.13, at 16-73 (3d ed. 1992). The trial court's conclusion that, "[t]o the extent [Prudential] operated in the dark, it pulled the curtain down on itself", was not an abuse of discretion. Opinion, Bonavitacola, J., dated March 26, 1997, at 26.

The federal courts have been confronted with similar belated requests for exclusion from class action settlements. The prevailing analysis in the federal realm is one of "excusable neglect," the determination of which rests within the discretion of the trial court. *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) (per curiam); *In re Prudential Securities Litigation*, *supra*, at 369; *In re Del-Val Financial Corp. Securities Litigation*, 154 F.R.D. 95, 96 (S.D.N.Y. 1994); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust*, 120 F.R.D. 51, 52 (N.D. Ill. 1988). As one court explained, under the Federal Rules of Civil Procedure, "[a]dequacy of notice to the class as a whole determines the binding effect of a class settlement on an individual member, [but] a Court retains the power to allow claimants to file late opt-out requests. . . ." *In re Prudential Securities Litigation*, *supra*, at 368 (citations and quotation marks omitted). To establish excusable neglect, a moving party must show both good faith and a reasonable basis for not acting within the time provided for exclusion from the class. *Id.* at 369.

> Even upon a finding of excusable neglect, it remains within the district court's sole discretion whether or not

> to grant the extension. Factors to be considered in making this decision include: the interests of the movants, the interest of the defendants, and the impact of granting the requested extensions on the Settlement itself.

Id. (citation omitted).

The United States Court for the Southern District of New York has considered two substantially similar cases under the excusable neglect standard. In *In re Prudential Securities, Inc.*, *supra*, a party seeking a late exclusion argued that Prudential's failure to inform them of the *existence* of a class action during the course of parallel litigation estopped Prudential from seeking a termination of the individual suit upon settlement of the class action. *Id.* at 369. They further argued that Prudential would not be prejudiced by their late exclusion because Prudential was aware of their intention to continue their individual actions. *Id.* The court found these arguments to be meritless, observing that pending litigation uniformly does not excuse a class member from filing an exclusion request. *Id.* at 370. The court then explained the meaning of prejudice in this context, noting that Prudential "bargained for the precise finality that these movants now seek to undermine." *Id.*

Similarly, in *Langford v. Devitt*, 127 F.R.D. 41 (S.D.N.Y. 1989), an attorney argued that, though he had notice of a federal class action and made every effort to monitor it in light of his own litigation in an Ohio state court, he should be allowed to opt out late because he had no actual notice of the deadline for exclusion. He urged the court to grant his request because "the defendants participated in both the New York and Ohio litigation knowing that [he] had been deemed a class member in the New York litigation, knowing that there was a risk that the New York litigation might be used to preclude [his] litigation in Ohio and, most egregious of all, knowing [he] was unaware of this status." *Id.* at 43. The court found this argument

"disingenuous," reasoning that his experience as an attorney and his actual awareness of the class action made him able "to understand the significance and potential effects of the class action, the means available to review the details of the class action, and the legal options regarding participation. . . ." *Id.* at 45. The court refused to permit him to rely on his own inaction to justify a late exclusion from the class. Here, Prudential has failed to convince us that the trial court was barred from reaching a similar conclusion on the indistinguishable facts of this case. *See generally Janicik v. Prudential Ins. Co.*, 305 Pa.Super. 120, 127 n.3, 451 A.2d 451, 454 n.3 (1982) (explaining that federal precedent is "instructive in construing Pennsylvania's class action rules" due to the heavy consideration of the Federal Rules and federal precedent in their drafting). The trial court's refusal of equitable relief was not an abuse of discretion.

Prudential argues that the trial court violated its due process rights by attempting to bind Prudential to the court's judgment without providing adequate notice to enable it to exclude itself from the settlement. The United States Supreme Court has explained the process due to those in Prudential's position:

> [T]o bind an absent plaintiff concerning a claim for money damages or similar relief at law, [a forum state] must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and

returning an "opt out" or "request for exclusion" form to the court.

Phillips Petroleum Co. v. Shutts, *supra*, at 811-12.

Prudential contends the notice it received was not the best that could have been accomplished. It identifies three places where notice could have been sent which were better suited to insuring that persons responsible for making decisions concerning Prudential's numerous properties were actually apprised of the need for action. First, Prudential argues that class counsel should have referred to the exclusion notices received in response to the first round of settlements when compiling the second mailing list, whereby notice would have been sent to Stephen Lauer, Prudential's in-house counsel at its Newark headquarters. Second, Prudential argues that notice to any particular property of Prudential, which owns real estate throughout the nation, is inadequate. It maintains that significant decisions respecting property should reasonably be expected to be made at corporate headquarters, the address of which is readily obtainable, and that one intending to provide the best notice would certainly have mailed it there. Third, Prudential claims that counsel for the trial class defendants also represented these parties in the New Jersey litigation, and that they assumed a contractual duty, pursuant to the settlement agreements, to ensure that notice for Prudential was sent to its counsel in the New Jersey action.

We first observe that Prudential received actual notice of this class action. Further, under Pennsylvania law, Prudential's assertion that it has no record of receiving the five settlement notices at separate locations is insufficient to overcome the presumption that these notices were, in fact, delivered. *See Kulick v. Com., Dept. of Transportation*, 666 A.2d 1148 (Pa.Cmwlth.1995), *appeal denied*, 674 A.2d 1077 (1996). While the adoption of the best practicable means of accomplishing actual notice is the responsibility of the nominal plaintiff in a class action, actual receipt of notice is

not the measure of the constitutionality of the notice method employed. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, "actual receipt of class notice is not necessary in order to bind an absent class member to a final judgment." *In re Prudential Securities, Inc.*, *supra*, at 369. While we believe Prudential's actual notice is sufficient to dispose of this claim, we will address the notice procedures employed in light of Prudential's challenges.

Initially, we note that Prudential completely misstates the burdens imposed on class counsel and the trial court in effecting notice of a class action settlement. Prudential's cites to *Geier v. Tax Claim Bureau of Schuylkill County*, 527 Pa. 41, 588 A.2d 480 (1991), and *Tracy v. Chester County Tax Claim Bureau*, 507 Pa. 288, 489 A.2d 1334 (1985) for the proposition that a reasonable effort must be made to ascertain the actual whereabouts of a property owner, including searching government records. These cases involved government foreclosure actions against property owners. The United States Supreme Court has stated that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants . . ., the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as the latter." *Phillips Petroleum, supra*, at 811. Accordingly, *Geier* and *Tracy* are inapposite to our determination in this case. Prudential essentially insists upon receiving the best notice that could be afforded based on its unique circumstances. The true measure of the constitutionality of class member notice under *Phillips Petroleum* must necessarily focus on what is "practicable" in the circumstances where equally effective notice must be sent to over 36,000 potential class members.

Prudential argues that notice should have been sent to the addresses listed on the few hundred exclusion forms received by the court in the first round of settlements. These exclusion notices were received in response to the notice sent

to everyone the federal government identified as a landlord of a federal agency in the years in question, presumably the best way of identifying this class. We think it eminently practical for the court and class counsel to have assumed that the previous notice was effective to reach at least those parties that had actually responded. If any person or entity requesting exclusion disagreed, they properly could be expected to enter an appearance or otherwise alert the court as to their preferred address. In giving notice of the second settlement, the court and class counsel justifiably focused their efforts on reaching those persons and entities whose addresses were not included in the first round. To this end, publication notice was expanded to include five trade publications and an internet site. We find that the widespread publication of notice utilized by class counsel was a constitutionally sufficient means of reaching parties who were not adequately identified through the government's list. *Mullane*, *supra*.

Prudential's contention that notice should have been mailed to its Newark headquarters because it was easily identifiable warrants little discussion. It is the antithesis of practicability to require that class counsel attempt to identify the actual location of the 36,000 individual and corporate lessors identified from the properties on the federal government list.

Prudential's third contention, that counsel for the trial class defendants deprived it of due process by failing to satisfy an alleged contractual duty to alert class counsel to the identity of Prudential's New Jersey counsel, is meritless. The *"plaintiff*, not defendant, in a plaintiff-class action is responsible for providing notice to the members of the defined class." *Langford v. Devitt*, *supra*, at 45 n.1, citing J. Moore & J. Kennedy, 3B Moore's Federal Practice ¶ 23.55, at 23-423 to 23-424 (2d ed. 1987). Pa.R.Civ.P. 1712(c) explicitly charges the plaintiff with the sole obligation of preparing class notice unless otherwise directed by the court. Defendants' alleged contractual duty does not alter

the minimal notice requirements under the Due Process Clause. Therefore, we conclude that Prudential received constitutionally adequate notice in this case.

Order **AFFIRMED.**

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION, On Behalf of Themselves and All Others Similarly Situated	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, W.R. GRACE & CO.-CONN., U.S. MINERAL PRODUCTS CO. and ASBESTOSPRAY CORPORATION	:	No. 0531 Philadelphia, 1997
APPEAL OF: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PIC REALTY CORPORATION and 745 PROPERTY INVESTMENTS (Collectively "PRUDENTIAL")	:	

Appeal from the Order dated November 27, 1996, docketed December 2, 1996, Court of Common Pleas, Philadelphia County, Civil Division, at No. May Term, 1986 No. 5388.

BEFORE: BECK, JOHNSON and MONTEMURO, JJ.:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ [Name]_____

PROTHONOTARY

Dated NOVEMBER 21, 1997

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
v.	:	
U.S. Gypsum Co., et al.	:	No. 5388

OPINION

BONAVITACOLA, P.J.

The fundamental question raised in this asbestos class action by the appeal of Petitioner, The Prudential Insurance Company of America and two of its subsidiaries ("Pru"), is:

Under what circumstances, if any, may an absent plaintiff class member opt out of the plaintiff class after entry of a judgment against him, her or it ("it") entered pursuant to Court approval of a class action settlement which, *inter alia,* limits (with one exception not here relevant) its remedies under assertable causes of action to participation in the settlement fund?

This appears to be an issue of first impression in which a Pennsylvania state court was required to deal with this issue. Consequently, it is helpful to turn to federal case law for guidance.

To understand the context in which this question arises a chronology is helpful.

BACKGROUND

On May 30, 1986, Peter Kalkus, owner of Virginia office buildings containing asbestos and having United States Government tenants, instituted this action against an array of asbestos manufacturers (only 28 of whom are not now

bankrupt) on behalf of himself and all United States building owners similarly situated.

Extensive discovery ensued. On or about August 23, 1989, a former judge of this Court determined Virginia's statute of repose barred Kalkus' claim. Nevertheless, to preserve this action, he allowed Plaintiff's counsel to find a substitute representative plaintiff. On October 18, 1989, Plaintiff counsel asked that Prince George Center, Inc. be allowed to intervene as class representative. On April 18, 1990, the Court allowed Prince George Center, Inc. to intervene as such.

Starting in 1988, various defendants entered into settlement agreements with plaintiff's counsel contingent upon Court approval, so that by about February 17, 1995, 24 of the 28 non-bankrupt defendants had executed settlement agreements and advanced settlement funds totaling $3,782,400 cash, plus a cash rebate program of GAF Corp. capped at $750,000 rebateable over seven years.

On April 16, 1992, the Court had certified the plaintiff class as follows:

> "All private owners of buildings within the fifty states of the United States of America and the District of Columbia which were leased or subleased in whole or in part to the Federal Government or any agency, department of unit thereof on or after May 30, 1986, in which buildings asbestos-containing material is or was present."

Also on April 16, 1992, the Court had given preliminary approval to the settlement agreements which had been entered into by that time.

Adopting the United States Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L.Ed.2d 628, 105 S.Ct. 2965 (1985) *("Shutts")* that a state court could entertain a nationwide class action on an opt-out basis,

the Court on May 7, 1993 ordered that this action so proceed.

After reassignment of this case, on August 31, 1994, we appointed Daniel I. Murphy, Esquire as Special Master to "case manage" this matter. The terms of his appointment and whether he failed to follow them is an issue being raised on appeal.

To facilitate court approval of the 24 settlement agreements which Plaintiffs' counsel had executed and not await resolution of the suit against the four remaining non-bankrupt defendants, this Court by order dated February 10, 1995 as amended February 17, 1995, decertified the class previously certified on April 16, 1992, and certified a "settlement class" to proceed with the settlement agreements and a conditionally certified "trial class" as permitted under Pa.R.Civ.P. 1710(d) to continue the litigation against the four non-settling defendants ("trial class defendants").

The Court defined these two classes as follows:

> ". . . a Settlement Class consisting of all private owners of any building or buildings in the United States that were leased or sub-leased in whole or in part to the federal government or any agency, department or unit thereof at any time between May 30, 1984 and December 22, 1994, inclusive, in which building(s) asbestos or asbestos-containing materials were present."

> ". . . a Plaintiff Class for purposes of trial consisting of all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or sub-leased their building(s) in whole or in part to the United States or any agency thereof; and, (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by U.S. Gypsum and/or U.S. Mineral Products Company and/or W.R.

> Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy with him/her or it to misrepresent or withhold from the public, knowledge of the hazards of asbestos.

When conditionally certifying the trial class, this court adopted the reasoning expressed in *Central Wesleyan College v. W.R. Grace & Co., et al*, 143 F.R.D. 628 (D.S.C. 1992), aff'd 6 F.3d 177 (4th Cir. 1993). In fact, paragraph 5D of our Order of February 17, 1995 explicitly so states.

Central Wesleyan was a class action on behalf of colleges throughout the United States whose buildings contained asbestos. Despite the plethora of individual issues pertinent to each claim, the *Central Wesleyan* courts had identified eight predominant common issues which in its view warranted class action adjudication. This was so notwithstanding the requirement of *Shutts, supra*, that the law of the locus state apply to each claim. The *Central Wesleyan* courts also felt the probability of a settlement justified conditional class certification. This Court, aware of the 24 settlements already reached, was of a similar view.

A case of similar import to *Central Wesleyan* was *In re School Asbestos Litigation*, 789 F.2d 996, at 1000 and 1009 (3d. Cir. 1986).

Throughout this litigation were two extant lawsuits of Pru and Space Center Dallas, Inc. ("Space Center") unknown to this Court and Plaintiffs' counsel.

On October 20, 1987, Pru, as owner of many commercial buildings, acting through its counsel Riker, Danzig, Scherer, Hyland & Perretti, ("Riker, Danzig") sued the trial class defendants in the Newark division of the

United States District Court of New Jersey. Its claim was based on damages incurred and to be incurred as a result of the hazardous effects of asbestos in its buildings. On March 26, 1996 it stipulated with the trial class defendants, per court approval, to limit its claims to 18 buildings, and to proceed to trial on all issues shortly after a Pre-Trial Conference on December 2, 1996.

On January 13, 1992, Space Center sued W.R. Grace, Co.-Conn., one of the four trial class defendants, in the United States District Court of Connecticut, for damages arising from the presence in its building in Dallas, Texas of asbestos which Grace had manufactured. Though it petitioned on October 4, 1996 for allowance of a late opt-out from the trial class and appealed from this Court's denial thereof, it withdrew its appeal on January 31, 1997. Hereinafter we will limit our fact presentation to matters involving Pru and not Space Center.

On February 17, 1995, this Court ordered *inter alia* that notice be sent to the settlement class describing the settlement terms with 24 defendants and scheduled a hearing date of May 19, 1995 for hearing objections and/or approving the settlements. If a class member wanted to opt out it had to file a written election to do so with the Court by April 18, 1995.

Per affidavits of Frank Barkan, C.P.A., a partner in the accounting firm of Rudolph, Palitz which handled dissemination of the notice, notices were mailed first class to 36,383 ascertained, absent, potential settlement class members (i.e., private building owners having federal tenants). With a view to notifying unascertained absent class members, he also caused, pursuant to this Court's February 17, 1995 order, a Summary Notice to appear twice in the *Wall Street Journal* and eight major metropolitan daily newspapers. This notice explained to class members how to obtain a copy of the more detailed, mailed notice and the

need to opt-out if the class member wanted exclusion from the class.

Plaintiff counsel had compiled the list of 36,383 ascertained potential class members by obtaining from the General Services Administration and the United States Postal Service names and addresses of their landlords. Pru appeared on this list seven times for seven buildings.

The introduction and paragraph 1 of this mailed notice explicitly described the certified settlement class and conditionally certified trial class by reiterating the language of the class re-certifications ordered on February 10, 1995 as amended February 17, 1995.

Barkan mailed seven notices to seven Pru buildings. Word of the 24 pending settlements in this case filtered through the Pru bureaucracy to Steven A. Lauer, a member of Pru's house counsel staff.

Subsequently, Lauer under date of April 28, 1995, executed the form to opt-out of the settlement class on behalf of Pru. 356 others had timely opted out of the settlement class. A copy of Lauer's Opt-out filed May 8, 1995 is attached hereto as Exhibit "A". No representative of Pru appeared at the May 19, 1995 fairness hearing.

On or about May 10, 1995, Lauer conferred with Robert Gilson of Riker, Danzig for advice as to how to further respond.

It appears that on that date Gilson drafted for Lauer's signature a letter directed to the Prothonotary which in essence said Pur wanted to be a member of any future class only on an *opt-in* basis after notice to Lauer. For unexplained reasons, neither Lauer nor Pru sent this letter, and, incident to Pru's petition now at issue, it submitted to us a redacted copy thereof. It claimed attorney client privilege as to the redacted portion and, in fact, withdrew the redacted draft. This draft letter is attached hereto as Exhibit "B".

On May 19, 1995, this Court approved on behalf of the settlement class settlements with the 24 settling defendants and judgment in those defendants' favor accordingly was entered May 23, 1995. There was no appeal.

At this time there were extensive discovery disputes going on between plaintiffs and defendants Grace and Gypsum. Two of these resulted in interlocutory appeals to the Superior Court. Nevertheless, by mid-April, 1996, the four trial class defendants had executed settlement agreements which ultimately substantially increased the settlement fund.

About one month after Pru had stipulated to limit its claims in the Newark case to 18 buildings, this Court on April 24, 1996, ordered that notice of settlements with the four trial class defendants be given and that a hearing thereon be held on July 24, 1996. Again, opt-outs had to be filed by July 9, 1996.

The contents of this notice and its modes of dissemination had been the subject of triangular discussions between Plaintiff lead counsel, Harvey Kronfeld, counsel for the four trial class defendants and the Special Master since February 12, 1996, when the Special Master met with counsel to review and suggest modifications to settlement agreements with the four trial class defendants and the Notice thereof to the class members.

Dissemination of the Notice included first class mail sent in early May 1996 to the 36,383 addressees (less returns) from the first mailing, notice on the internet, advertising in the same newspapers used in the first round and ads in five trade publications. Paragraph 24 of the Notice of the Settlements with the trial class defendants poignantly stated:

> "If you are already a party to another lawsuit against Grace, U.S. Gypsum, U.S. Mineral and/or Asbestospray not involving personal injury, you must nonetheless file an Exclusion Request; otherwise, you will be bound by

the Settlement Agreement and the Final Judgment Order, and your other lawsuit will be enjoined."

Of the seven notices mailed to Pru buildings the Post Office returned two. Presumptively, the other five were delivered.

Pru did not opt out as it had incident to the settlements with the 24 settlement class defendants. Pru did not appear at the settlement "fairness" hearing on July 24, 1996.

On July 24, 1996, this Court, after hearing, approved the settlements with the four trial class defendants. It noted at that hearing, 289 had opted out of the trial class. This was an important determination since the Grace and Gypsum settlement agreements were rescindable by Grace or Gypsum if there were 500 opt-outs. The Prothonotary entered judgment in favor of the trial class defendants on August 13, 1996. This judgment, *inter alia*, served as a release by the non-opting out trial class members of the four trial class defendants as to any claims asserted or assertable in the underlying class action and limited them to recovery from the settlement fund per future court order.

Upon completion of payments by September 14, 1997, this second settlement will have garnered $7,740,000 cash in addition to the $3,782,000 cash deposited in the first round of settlements for a total of $11,522,000.

Immediately after expiration of the appeal period, the four trial class defendants notified Pru of this Court's judgment ordered on July 24, 1996 and entered on August 13, 1996. They claimed this Court's judgment applied to at least 6 and possibly 8 of the 18 buildings at issue in the Newark litigation.

Pru, on September 30, 1996, petitioned for relief, labeling it as a Petition for a Declaration that It is Not a Class Member.

After (1) extensive briefing in support of and opposition to Space Center's and Pru's petitions, (2) review thereof by the Special Master, (3) an approximate 3 hour oral argument thereon on November 12, 1996, per an agenda set forth by the Special Master in his letter of November 5, 1996 to counsel (attached hereto as Exhibit "C"), and (4) further submissions at the invitation of the Special Master which he digested, this Court, after receiving the Special Master's report and reviewing pertinent documentation on November 27, 1996 denied Pru's petition. Our reasons for doing so rest on both equitable and public policy grounds. We enumerate them hereinafter.

On December 10, 1996, Petitioner Pru petitioned for reconsideration of this Court's Order of November 27, 1996 denying it relief. After the Special Master summarized Pru's supporting briefs for this Court on December 17, 1996 we denied reconsideration.

Appeal to the Superior Court followed in due course.

To clarify the issues on appeal this Court on January 3, 1997 invoked Rule of Appellate Procedure 1925(b) to require appellants to submit a ". . . concise statement of matters complained of on appeal." They did so in a timely manner.

As stated at the beginning of this opinion this Court had to determine if there were any "circumstances" justifying the relief Petitioner Pru seeks. The Petitioner has cited many "circumstances". This Court deals with them below and treats the questions they raise as subsidiaries of the initial primary question.

Further, it should be noted there are no issues of material fact which we were required to resolve and that all material facts are of record.

We are mindful of Frederick the Great's military admonition that: "To defend everything is to defend nothing." Since, however, we are dealing with a legal rather than military confrontation, prudence dictates that we

respond to every "circumstance" raised by Petitioners. The monetary stakes are substantial.

Nationwide Class Action on an Opt-Out Basis

Pru has challenged this Court's jurisdiction over it citing *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12 (1975), *cert. denied*, 429 U.S. 828, 97 S.Ct. 86 (1976) to the effect that for a Pennsylvania court to have jurisdiction over a non-resident class member he/she or it must opt-in. The explanatory note to Pa.R.Civ.P 1711 reiterates this holding.

In *Phillips Petroleum v. Shutts*, supra, however, the United States Supreme Court 10 years after *Klemow*, sanctioned the opt-out procedure adopted by this Court's order of May 7, 1993.

Certainly, on the strength of *Shutts* there can be no due process basis for concluding this Court lacks jurisdiction over Pru or any other plaintiff class member.

Though there is no factual record showing the extent to which Pru does business in Pennsylvania, this Court takes judicial notice of the fact that perusal of the Philadelphia telephone directory shows the pervasive presence in the Philadelphia metropolitan area of "The Prudential," "Prudential Preferred Properties" and "Prudential Securities Incorporated." If need arose to develop a record it is more likely than not that Pru would also be subject to this Court's jurisdiction on the ground of doing business in Pennsylvania.

Pending Litigation was not a Constructive Opt Out

Relying primarily on *McCubbrey, et al. v. Boise Cascade Home & Land Corporation*, 71 F.R.D. 62 (N.D.Cal. 1976), Pru argues that its pending lawsuit in Newark was a constructive opt-out in that it was a clearly expressed intention not to participate in the class action *sub judice*.

We reject this argument for several reasons.

Initially, we note that despite *McCubbrey* the heavy weight of located federal case law authority either by explication or implication holds that pending litigation is not a constructive opt-out from a class action.

The *McCubbrey* facts are relatively straight forward. Boise Cascade had developed recreational subdivisions. McCubbrey, as a representative class plaintiff, sued it claiming various misrepresentations incident to the sale of the subdivisions. The case settled on terms whereby a property owner could elect to be in one of three categories. One of these was to elect to opt-out, retain your property and pursue an individual remedy.

The settlement notice failed to point out that failure to opt-out bound one to one of two other settlement categories, neither of which permitted the bringing of an independent lawsuit.

20 parties instituted actions in the California state courts and Boise Cascade asked the federal court, in aid of its jurisdiction and judgment approving settlement, to enjoin the California actions.

The 20 claimants fell into three categories. The pertinent one for our consideration consisted of three parties who in response to the notice and during the exclusion period, filed lawsuits rather than an opt-out notice. The notice to them did not advise them of the consequences of failing to opt out. As to these three, the Court held they ". . . effected substantial compliance with the opt-out requirement and are thus not bound by the class adjudication."

McCubbrey, based on our research, appears to be aberrational. The Court there acknowledged that:

> "[Five cited] authorities have stressed that liberal relief from failure to follow requisite exclusion procedures will erode finality of complex adjudications, discourage class action settlements, permit return of the former option of

one-way intervention and place a burden on judicial resources."

It went on to state that courts which have insisted on strict compliance with opt-out procedures have ". . . feared that liberal relief from binding class adjudications, [or] permitting substantial or late compliance with exclusion procedures, will encourage collateral attacks on class adjudications, so that each class suit will become a hydra-headed monster triggering multiple subsidiary actions." It then in an illustrative footnote cited seven cases.

In contrast, the *McCubbrey* court could cite only one case and one commentator supposedly supportive of its view to allow liberal opt-outs.

The "strict compliance" view which this Court believes to be prudent is illustrated in a multitude cases. We cite some of them.

In 7A *Wright and Miller* §1787, page 213 the expressed view is:

"The key is that some communication of the member's intent [to opt-out] must be received *by the court* prior to the entry of judgment." (Emphasis added).

Here, though Pru received notice of the round 2 settlements, it communicated nothing to this Court.

Other cases have held explicitly that pending independent litigation regarding the issues in the class action does not constitute an opt-out. *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 513 (S.D.N.Y. 1973), *aff'd. per curiam* 490 F.2d 1183 (2d. Cir. 1974) held:

"While the plaintiffs had previously instituted an independent action against Grinnell, the existence of that action did not automatically exclude plaintiffs as class members. The exclusion could only be effected by compliance with the [notice] provisions of Rule 23(c)(2)(B)."

In *Penson v. Terminal Transport Company*, 634 F.2d 989 (5th Cir. 1981) private individuals had instituted two class actions against Terminal Transport in 1972. They alleged Terminal engaged in racially discriminatory employment practices.

In 1974, Terminal discharged Penson who promptly filed an employment discrimination claim with the Equal Employment Opportunity Commission. On August 4, 1975, the trial court in the class actions approved a consent decree against Terminal in partial resolution of the class actions. After certifying a class of which Penson was a member, the Court ordered Terminal to mail notice of the consent decree to all of its affected present and former employees. Terminal did so in April 1976.

Penson got the notice, but took no action. Though the Court had ordered Terminal to advise class members of their right to opt-out, Terminal failed to include this information in the notice. It was for this reason that Penson was allowed to continue his individual action. As a matter of dicta, however, for the future guidance of Fifth Circuit Courts, the court noted at page 996:

> "Penson cites no cases which support [his] argument that the filing of the charge with EEOC prior to the consent decree accorded him a vested statutory right which could not be barred. The cases are persuasive to the contrary. *A judgment or consent decree entered in a class action can bind the absent class member even though the member had filed a claim or instituted a personal suit before the decision in the class action.* [Citing cases]" (Emphasis added)

The mailed and advertised class notice in *In re Prudential Securities, Inc.*, 164 F.R.D. 362 (S.D.N.Y. 1996) " . . . informed Class Members of the necessity to opt-out by October 30, 1995 if a Class Member desired to proceed individually with his or her claims against any of the Settling Defendants or Released Parties."

In rejecting the argument of several class members that the pendency of their individual actions entitled them to special notice the court stated at page 370:

> "It is well established that pendency of an individual action does not excuse a class member from filing a valid 'request for exclusion' [Citing] *Berman v. L.A. Gear, Inc.*, No. 91 Civ. 2653, 1993 WL 437733 at *5 n.1 (S.D.N.Y. Oct. 26, 1993), aff'd 29 F.3d 621 (2d Cir. 1994) and *Supermarkets General*, supra."

We also have noted three other decisions which did not permit opt-out because of the pendency of individual cases, similar to Pru's position in the instant case. They are:

Supermarkets General Corporation et al. v. Grinnell Corporation, et al., 490 F.2d 1183 (2d Cir. 1974);

In re National Student Marketing Litigation v. The Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976); and

Langford v. Devitt, 127 F.R.D. 41 (S.D.N.Y. 1989).

Two cases cited by Pru we deem to be inapposite.

In re Del-Val Financial Corp. Securities Litigation, 154 F.R.D. 95 (S.D.N.Y. 1994) involved a *pro se* petitioner who *received notice after* the opt-out date and wanted a late opt-out so as to continue her individual action against a non-settling defendant which she had instituted before issuance of notice. The Court allowed her to opt out late.

In re Farmers Group Stock Options Litigation, 1991 WL 332500 (E.D.Pa.) involved two floor brokers at the Philadelphia Stock Exchange who were awaiting the outcome of that exchange's disciplinary action against options writers as a prelude to their asserting individual claims. They sent an opt-out letter after the opt-out date but before the fairness hearing. The reason for their tardiness was that they *received the settlement notice after* the opt-out date. They also were allowed to opt-out.

Equitable Considerations

Paragraph 24 of the Notice to certain absent, potential class members, quoted above, is extremely specific in telling those litigating non-personal injury claims against any of the four trial class defendants that they must opt out or be bound by the settlements. To circumvent the explicit notice provision in paragraph 24 of Notice to the Plaintiff Class, Petitioner advances several arguments.

No Excusable Neglect

Pru argues that its failure to opt out of the second round of settlements as it did in the first round is a result of "excusable neglect." It focuses on *McCubbrey*, supra, to support this argument. A review of Federal Court decisions since *McCubbrey*, however, indicates that "excusable neglect" in the present context has become a legal label without meaning.

Initially, we note that determination of "excusable neglect" is within the sound discretion of the trial court and can be upset only upon a showing of abuse thereof. *Mars Steel v. Continental Illinois*, 120 F.R.D. 51 (N.D. Ill. 1988). Furthermore, to grant relief from a class action judgment on the ground of "excusable neglect", the court must conclude that the need for relief outweighs the desirability for finality of class action judgments. *In re National Student Marketing Litigation*, supra.

It is apparent to us from a review of Federal Court decisions that public policy considerations supporting finality of judgments in a class action context override whatever equitable considerations may favor a particular party's not being informed of a prospective class action judgment. *See e.g. Trist v. First Federal S&L of Chester, et al.*, 89 F.R.D.1 (E.D.Pa. 1980) where plaintiffs' class counsel, through clerical error, failed to mail notice of the settlement to 37 out of approximately 25,000 bank depositors who were

members of the plaintiff class. The court held the 37 bound to the settlement.

In this regard, a major concern of several federal courts and this Court is that when class action defendants settle they are buying, among other things, surcease from litigation a/k/a releases. Without this prospective certainty, it is questionable how many class actions would settle.

Of particular note in the instant case is that the two largest defendant payors negotiated as a condition of peace the right to upset the settlement if 500 of more than 35,000 prospective plaintiff class members opted out.

Of significance to us was the Court's observation in *In re VMS Limited Partnership Securities Litigation*, 1995 WL 355722 (N.D Ill.) that:

> ". . . in the interest of finality the class action settlement executed by the parties should not be disturbed over three and one half years after the end of the opt-out period. It is likely that if the Court were to grant Ali's Rule 60(b) motion [premised on lack of notice entitling him to relief from the class action judgment] other class members would come forward to request exclusion and the settlement would begin to unravel. . . . A too liberal application of Rule 60(b) in class actions would undermine the finality of judgments entered therein and would discourage settlement of such actions. . . . Defendants would be loath to offer substantial sums of money in compromise settlements of class actions unless they can rely on the notice provisions of Rule 23 to bind class members."

No Valid Reason for Failure to Respond

Pru next contends that its seeking to avoid the July 24, 1996 judgment against it is analogous to a petition to open a default judgment. As we explain below, we do not deem Pru's petition as analogous to a petition to open a default judgment. Even if it were, under Pennsylvania law, this

requires a showing of three elements: 1. Moving promptly to open after knowledge of the default judgment; 2. A valid reason for failure to respond to the pleading upon which default judgment was entered, and 3. A showing of a defense on the merits. *Flynn v. Casa DeBertacchi Corp.*, 674 A.2d 1099 (Pa.Super. 1996).

In our view, Pru stumbles on the second of these three required elements, viz. giving a *valid* reason for failing to respond to this Round 2 notice. It opted out of Round 1. It has not explained why at least one of the five USPS-delivered notices failed to get through to corporate house counsel. As was observed in *Supermarkets General Corporation v. Grinnell*, 59 F.R.D. 512, 514 (S.D.N.Y. 1973) *aff'd per curiam*, 490 F.2d 1183 (2d Cir. 1974):

> "The failure of the internal procedures of the plaintiffs to see that the notice reached the proper person is no excuse."

No Duty of Defendants to Inform Pru

Pru offers another reason for its failure to respond to the Round 2 notice by opting out. It says the trial class defendants had a duty to make sure notice was sent to its Newark headquarters and/or Riker, Danzig and/or Steven Lauer, Esquire. For Pru to arrive at this conclusion, it has to contort federal class action case law.

Federal decisions clearly hold that class action defendants, unless ordered by the Court, have no duty to aid in dissemination of notice to the class. 3B J. Moore & J. Kennedy, Moore's Federal Practice, ¶ 23.55 at pp. 23-432-4 (2d ed.); both *Supermarkets General v. Grinnell,* supra.; *In re VMS Securities Litigation*, 1994 WL 386397 (N.D. Ill.); *National Student Marketing,* supra., and *Langford v. Devitt,* supra., at footnote 1 citing *Moore's Federal Practice,* supra.

Hence, even if our present situation were analogous to opening a default judgment (which, as explained below it is

not) Pru has failed to offer any *valid* reason for its not responding to the Round 2 notice.

Not Analogous to Default Judgment

Furthermore, we do not agree that the opening-of-a-default-judgment analogy applies here. Why? Because a class action context is a horse of a different color.

In contrast to a default judgment situation, the class action defendant in whose favor the judgment runs has paid money for the judgment. He does not seek the judgment as a prelude to collecting money. Hence, the public policy reasons favoring finality of class action judgments come into play.

Another concern differentiating the class action judgment from the default judgment situation is that permitting a class member to avoid the judgment could encourage other class members over time doing the same thing. The Court then would be faced with a management quandary as to when to initiate distribution to qualifying class members. In other words, finality of class membership is as important an element as finality of judgment.

One may ague that the statute of limitations can tell us when individual claims no longer are justiciable and, therefore, the time frame for determining class membership is finite and determinable.

Sun Oil Company v. Wortman, 486 U.S. 717, 108 S.Ct. 2117 (1988) tells us we are free to apply Pennsylvania's statute of limitations to the claims of *class members.* Furthermore, *Today's Express, Inc., et al. v. Barkan, et al.,* 626 A.2d 187 (Pa.Super. 1993) would preclude a *class member* from asserting the "discovery rule" exception since in this case, per *Today's Express* guidelines, every class member was able to determine the presence of asbestos in his/her or its building and can be presumed to know of its deleterious effects. Hence, Pennsylvania's two-year statute of limitations would apply and begin running on August 13,

1966, when final judgment in this case was entered. 42 Pa.C.S.A. §5524(7).

Though this analysis has the appearance of providing a finality date, there is one potential argument which concerns this Court. If a class member in the future wants to opt out he/she or it may seek to avoid Pennsylvania's statute of limitations by arguing that his/her or its claim, as a non-class member who gains that status via court-approved opt-out, per *Shutts,* is governed by the statute of limitations of the locus of the claim. This argument could have validity. Faced with this potential, this Court believes it could find the instant action unmanageable since it would not know with certainty when to close the plaintiff classes.

Even if *Shutt* would not come into play regarding application of another state's statute of limitations to a potential opt out and Pennsylvania's two-year statute were the measuring period, we see no reason to delay for two years distribution to the plaintiff classes to accommodate potential opt-outs.

No Duty of Defendants to Inform Newark Court

Pru believes it was "sandbagged" by the four trial class defendants because they continued to litigate with vigor the Newark action from July 8, 1996, the end of the opt-out period, until approximately September 12, 1996 when this Court's judgment of July 24, 1996 against them became non-appealable. Pru claims the four trial class defendants knew or should have known it failed to opt-out and, per common law requirements or professional rules of conduct, had a duty to reveal to the Newark court what had occurred in Philadelphia. Had the trial class defendants promptly advised the Newark Court after July 8, 1996, Pru, so the argument goes, would have had an opportunity to appear at the July 24, 1996 hearing to request a late opt out and oppose the settlements and, if unsuccessful, appeal this Court's judgment entered against it.

We reject this specious argument on three grounds. First, as is explained below, Pru's counsel, knowing of the pendency of the trial class suit, had a duty to track the instant litigation. Pru's counsel can not shift to defense counsel the duty to keep Pru informed. Second, Pennsylvania law is very clear that the court can not graft the Professional Rules of Conduct onto the common law. Third, had any of the four trial defendants advised the Newark Court of our actions after July 8, 1995, they may have violated their duty of fidelity to the client and be subject to malpractice liability for having done so. Such a determination, however, is not now needed.

As to the first point, we find two federal class action decisions instructive and worthy of adoption. They are *In re National Student Marketing Litigation,* supra, and *Langford v. Devitt,* supra.

In *National Student Marketing* 38 former shareholders of that company (NSMC) instituted suit against it and others in New York state court on December 7, 1971 alleging they had been fraudulently induced to buy NSMC stock. Prior to that, others, making similar allegations, had instituted class actions in the District of Columbia federal district court. Three of the New York state court defendants who also were defendants in the class action asked the New York court to stay those proceedings because of the pending class action. On appeal they added another reason, namely that a motion for class action determination was *sub judice* in Washington.

Though their counsel was made aware of the District of Columbia proceedings, the 38 New York plaintiffs failed to opt out timely claiming, subsequently, they had not received notice of the pending class certification. Six months after expiration of the opt out period, the 38 New Yorker plaintiffs moved for exclusion from the Washington plaintiff class.

The Court denied their request for several reasons one of which is particularly applicable to Messrs. Gilson and Lauer, Pru's Counsel. At page 1015-6 the court observed:

> "We further note that having been informed during argument before the [New York] Appellate Division in June 1973, that a motion for class action determination was then pending in federal district court, *appellants' counsel was under a duty of diligence to keep abreast of events which so clearly affected the interests of his clients.*" (Emphasis added)

Similarly, Messrs. Gilson and Lauer, having received the round 1 notice which advised of the pending trial class litigation and having gone so far as to contemplate a request that Pru be a plaintiff-participant only on an opt-in basis, they had ". . . a duty of diligence to keep abreast of events which so clearly affected . . ." Pru's interests, and we so hold. Whether they fulfilled that duty is a judgment we do not make since such is not necessary for this adjudication.

Langford is of similar import. It was a federal court class action based on an allegedly false and misleading prospectus issued by Bioassay Systems Corp. ("Bioassay"). The Murray & Murray Pension Plan, established by the Murray & Murray law firm of Sandusky, Ohio, had purchased Bioassay stock allegedly in reliance on the prospectus. It instituted an individual action in Ohio state court. John T. Murray represented it. He acknowledged ". . . that he [was] experienced in the litigation of class actions and that he diligently followed [the class] action by reviewing the docket sheet, obtaining documents from this Court, and repeatedly requesting information regarding the status of the [class action] from the class representative."

Unfortunately, the notice to The Murray & Murray Pension Plan advising of a hearing on a proposed settlement and the right to opt-out was misdirected to Willard (not Sandusky) Ohio.

One day after the court entered an order approving the class and settlement, defense counsel wrote Murray to advise him the Murray & Murray Pension Plan Ohio action must be withdrawn because the class action Order of Final Judgment

enjoined prosecution of analogous actions. John T. Murray claimed this was the first he knew of the class certification. (Messrs. Gilson and Lauer claim the first they knew of our July 24, 1996 order was a result of the September 13, 1996 communications from Grace and Gypsum to Riker, Danzig).

The court was unsympathetic.

First it pointed out that Murray's partner, Dennis Murray, as an individual shareholder of Bioassay had probably reviewed notice of the pending class certification since John T. Murray's correspondence to defense counsel so indicated. The Court then observed at pages 44-5:

> "John T. Murray, unlike a layman, was then in a position to understand the significance and potential effects of the class action, the means available to review the details of the class action, and the legal options regarding participation in the class action."

Similarly, Messrs. Gilson and Lauer were in a position to understand the potentially adverse effects of Pru's not opting out of this class action if its individually litigated claims had greater potential.

A second facet of this argument seems to place reliance on Rules 3.3(b) and 4.1 of the Rules of Professional Conduct in that failure of the trial class defendants' lawyers to disclose developments in the instant litigation enabled their clients to commit a "fraud" upon the Newark tribunal and Pru.

This rationale, in our view, fails for two reasons. First, as explained above, Pru's counsel, not defendants' counsel, had an affirmative duty to track this action. Since defendants' counsel had no duty to speak there was no *necessity* for them to make disclosure which is a prerequisite for application of Rules 3.3(b) and 4.1.

Second, in a plurality opinion, in *In re Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215, 221 (1984) our Supreme Court stated:

> "Thus, while it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility . . . we are not inclined to extend that enforcement power and allow our trial courts themselves to use the Canons to alter substantive law or to punish attorney misconduct."

In the event there was any doubt that Pennsylvania precluded use of the Rules of Professional Conduct to advance a litigant's cause, the Supreme Court clarified its position in a 5-2 decision in *Maritrans GP Inc., et al. v. Pepper Hamilton & Scheetz, et al.*, 529 Pa. 241, 602 A.2d 1277, 1284 (1992). It there held:

> ". . . simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable in damages or for injunctive relief."

Dicta accord is also found in *Rebida v. Murasko*, 450 Pa.Super. 546 n.3, 677 A.2d 331, 335 n.3 (1996) ("the Code of Professional Conduct does not have the force of substantive law") and *In Re Block*, 425 Pa.Super. 300, 310 n.8, 6225 A.2d 57, 62 n.8 (1993) (". . . our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow Courts to alter substantive law or to punish an attorney's misconduct").

We conclude, therefore, defendants did not "sandbag" Pru. To the extent it operated in the dark, it pulled the curtain down on itself.

Potential Prejudice to the Class if Petitioners May Opt Out Nunc Pro Tunc

During oral argument before the Special Master on November 12, 1996, focusing on Petitioners' right to opt out of the Plaintiff Class *nunc pro tunc*, the Special Master

expressed concern that if there were a series of late opt outs there could potentially be two detrimental effects to the Plaintiff Class.

First, as noted above, late opt outs entail an indeterminable date for distribution of the settlement funds.

The second reason advanced by the Special Master was that if there were a series of opt-outs over time the total opt outs might increase from the 289 who had opted out by the July 8, 1996 cut-off date to 500 thereby undoing the W.R. Grace and U.S. Gypsum settlements amounting to $7,600,000.

In response to the Special Master's request of November 5, 1996 (see his letter of that date attached hereto as Exhibit "C") U.S. Gypsum placed on the record the fact that there were approximately 3,804 parties whose buildings contained asbestos presently suing it in 32 lawsuits. It was not possible to determine how many of these 3,804 would qualify as members of the Plaintiff Class, i.e. have had federal government tenants between May 30, 1984 and December 22, 1995.

Counsel for W.R. Grace on November 26, 1996 supplemented its prior submissions to this Court by pointing out that there were 2,047 private colleges and universities who were plaintiff class members in the pending class action of *Central Wesleyan* in which it and U.S. Gypsum were defendants. During the oral argument of November 12, 1995 Grace's counsel had speculated that a sufficiently large number of private colleges and universities had United States Postal Service tenants and asbestos so as to raise the possibility that more than 211 of them might seek *nunc pro tunc* opt out if Pru were so allowed to opt out and thereby "blow" the settlements with Grace and U.S. Gypsum.

Pru's counsel under date of November 25, 1996 submitted a responsive argument terming the Grace assertion "the floodgate scare." Pointing out that 10-K filings with the

Securities and Exchange Commission as of December 31, 1995 showed that Grace had 47 and U.S. Gypsum 32 asbestos property damage cases pending against them, he went on to argue:

> ". . . Out of those 79 total cases, *Mealey's* has reported that several have settled; it is necessary *to subtract* those that have settled. From the remainder, it would be necessary to subtract all of the cases that do not involve government leases. From the remainder, it would be necessary to *subtract* the duplications, where Grace and Gypsum are co-defendants in the same case. Then, out of that remainder, there would have to be *subtracted* the individual plaintiffs who have already opted out of this action. After those adjustments were made, the remaining individual defendants would be reduced to a handful."

Unfortunately, the parties at that time were unable to drape numbers on this syllogistic skeleton.

On November 27, 1996 this Court entered two orders denying Pru's and Space Center's petitions seeking permission to opt out *nunc pro tunc*.

Pru promptly moved for reconsideration. By December 8, 1996, as a result of some fast detective work with the United States Postal Service, it was able to demonstrate that as of that date, only 64 private colleges and universities in the United States had USPS leases.

Pru then argued that:

> ". . . there is no basis for defendants' opt out scare in the future . . ." (page 3 of the Brief in Support of [its] Petition for Reconsideration).

Though impressed with Pru's investigative celerity this Court is still of the belief that more than 211 potential *nunc pro tunc* opt outs may be awaiting Pru's success. We need to consider other possible late opt-outs:

1. Of America's 2,047 private colleges and universities how many had asbestos and ROTC leases between May 30, 1984 and December 22, 1995?

2. How many during that time frame had asbestos and federal tenants using their facilities for other purposes such as research?

3. Of the approximate 1760 litigants against U.S. Gypsum at the time of the November 12, 1996 oral argument who were not private colleges and universities, how many had federal tenants?

We could engage in "what ifs" interminably. We do not propose to do that. Rather, we believe that public policy, for reasons noted above, strongly favors the finality of judgments in class actions and that this Court should do nothing having the potential to risk that finality.

Estoppel

In its Appellate Rule 1925(b) Statement of Matters Complained Of, assignment of error #1, Pru rhetorically asks whether ". . . defendants W.R. Grace & Co. — Conn. and United States Gypsum Company were *estopped*, by virtue of the prior positions they took in other federal court actions, from contesting that Prudential opted-out of this class action by actively litigating its own asbestos property damage action against them in New Jersey?"

In support, Pru placed before us Grace and Grace/Gypsum briefs submitted in *NBD Bank, N.A. v. Grace and Gypsum* (U.S.D.C., E.D.Mich. No. 94-CU60111AA) and on appeal in the same case to the United States Sixth Circuit Court of Appeals, No. 95-2255. It also brought to our attention a Grace brief in *DeVries, et ux. v. Grace* (U.S.D.C., E.D.Mich. No. 94-72412).

Pru then quotes Grace/Gypsum statements from two of their briefs to the effect that when the Plaintiffs, *NBD, N.A.*

and *DeVries* instituted individual litigation against them, they voluntarily opted out of the Prince George case.

At page 4 of its brief in support of its Petition for Reconsideration [of this Court's Order of Dismissal of November 27, 1996] Pru asserts:

> "Defendants' positions estop them from *arguing* that Prudential had not effectively opted out . . . Principles of judicial estoppel will not allow this kind of inconsistently (sic)". (Emphasis added)

Our reading of the lower court opinions *NBD, N.A.* and *DeVries* would not cause us to put the same spin on the paraphrased language from the Grace/Gypsum briefs as Pru does. Those opinions seem to say that institution of the individual actions is an indication of intent to opt out. Such a determination, however, is not relevant to our decision.

Arguing that Grace and Gypsum are estopped as Pru contends, is of no moment. Why?

First, the *reductio ad absurdum* of this argument is that the law in its majesty would not permit one to change his or her mind.

Sophistry aside, the second point is, in our view, extremely important. It is that this Court has the plenary responsibility to determine class membership. Nothing that Grace/Gypsum may say or do may circumscribe or dilute this responsibility.

In a class action, the Court's posture differs from civil actions generally. In a class action, the Court is not merely a passive adjudicator but rather an active participant one of whose responsibilities is to define and certify the class. (Pa.R.Civ.P. 1708 and the criteria enumerated therein).

Faced with this reality, Pru seems to have argued in its brief for reconsideration of this Court's dismissal order of November 22, 1996 that had we known of Grace/Gypsum's stances in the Michigan cases, we would have declared that

Pru's institution of the Newark case was a constructive opt-out from the instant case.

Frankly, what Grace/Gypsum argued in the Michigan case would have had no influence on our thinking since the equitable and public policy reasons expounded elsewhere herein in support of our position still prevailed. Hence, our order of December 17, 1996 denying Pru and Space Center's petitions for reconsideration.

Our third point is that the parties in the instant action have, in our view, asserted overly broad interpretations of the concepts of judicial and equitable estoppel.

Pru, as noted above, interpreted Grace's briefs in the Detroit actions cited above as claiming that institution of individual causes of action comparable to those pending in the present class action constituted a constructive opt out of the class action. Hence, Grace could not now take a contrary or inconsistent position.

Not to be outdone, Grace, without establishing any factual basis in its initial brief, made the bold assertion that Pru is now taking positions contrary to those it took in other class action litigation. Grace could have cited *In re Prudential Securities Incorporated Limited Partnership Litigation,* supra. There the Court per the quote, supra, held that the pendency of an individual action by a class member against Pru, does not excuse him/her or it from filing a valid request for exclusion. The court also held that such a class member was not entitled to supplemental notice from Pru. One can safely assume Pru advanced arguments in support of these holdings. Such arguments would be contrary to some of those it now advances.

We believe Judge Sarokin's opinion in *Ryan Operations GP, et al. v. Santiam-Midwest Lumber Co., et al.,* 81 F.3d 355 (3d.Cir. 1996)) is an incisive explanation of the doctrines of judicial and equitable estoppel and the differences between them.

There Ryan, a homebuilder, purchased wood trim sold or manufactured by the defendants. The trim's paint and primer, after installation started peeling off and precipitated numerous complaints from home buyers. In the fall of 1991 Ryan undertook a repair and replacement program. In April 1992, Ryan sought re-organization pursuant to Chapter XI of the United States Bankruptcy Code. When filing its schedules Ryan did not disclose its potential claims against the defendants nor the potential homeowner claims against it.

In June 1992, Ryan received court authorization to hire counsel to sue unnamed people responsible for "homeowners claims."

In December 1992, Ryan sued the defendants while still in Chapter XI. In July 1993, the bankruptcy court, without knowing of Ryan's suit against the defendants nor its potential for recovery, approved a plan of reorganization. Under the plan of reorganization creditors were to ". . . receive 91 percent of any future recovery on the [defective trim] claims and. . . . suffer 91 percent of the loss if Ryan [were] unable to recover the expenses incurred in the repair and replacement program from defendants."

Relying on *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953) Judge Sarokin stated the broad definition of judicial estoppel as follows:

> "Judicial estoppel, sometimes called the 'doctrine against the assertion of inconsistent positions,' is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that (s)he has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; *rather it is designed to prevent litigants from 'playing fast and loose with the courts'*. . . . the basic principle . . . is that absent any good explanation, a party shall not be allowed to gain an advantage by litigation on one theory and then seek an

> inconsistent advantage by pursuing an incompatible theory."

Judge Sarokin refused application of the judicial estoppel doctrine against Ryan by pointing out that determination of whether a party has asserted inconsistent positions entails a two part inquiry, viz.

> "(1) is Ryan's present position inconsistent with a position it asserted in its Chapter 11 proceedings; and (2) if so, did Ryan assert either or both of the inconsistent positions *in bad faith — i.e., with intent to play fast and loose with the court.*" (Emphasis added)

Judge Sarokin found that Ryan had not acted in bad faith for two reasons. First, though it failed to disclose the potential claims against the defendants it also failed to disclose the potential homeowner claims against it. Consequently, it gained no unfair advantage. Second, Ryan permitted the creditors to be 91% contingent risk takers in the claims against the defendants. The court concluded Ryan had not acted in bad faith.

Similarly, we hold neither Pru nor Grace/Gypsum has acted in bad faith toward this Court or the Newark Court. Though not clearly articulated in *Ryan* the inconsistent positions must involve inconsistent positions of *fact*. Inconsistent legal *arguments* do not per se result in a court's allowing a party to gain an unfair advantage. Inconsistent assertions of fact, however, are akin to fraud upon the court. Judicial estoppel is intended as a remedy available to the court to prevent its being manipulated to a party's unfair disadvantage as a result of reliance upon facts which are inconsistent with or contrary to prior factual claims made to a legal tribunal. To our knowledge neither Pru nor any of the trial class defendants have made inconsistent *factual* claims pertinent to the case *sub judice*.

Equitable estoppel, as pointed out in *Ryan*, requires elements similar to fraud, viz a misrepresentation and

reliance thereon to a party's detriment. Misrepresentation can occur via silence when one has a duty to speak and the other party thereby is misled to his disadvantage. Pru asserts the trial class defendants had a duty to inform them via the Newark Court of developments in the instant case. We addressed this argument above and concluded the trial class defendants had no such duty.

At page 18 of its brief in support of its December 10, 1996 Petition for Reconsideration of this Court's Order of November 27, 1996 denying Pru's request to opt out, Pru ". . . request[ed] discovery so that the Court can address the issues which Prudential had previously reserved, including: (1) the adequacy of the settlement; (2) the appropriateness of the class certification; (3) the adequacy of representation of Prudential in the class; and (4) this Court's jurisdiction over Prudential."

Adequacy of Settlement

Pru blandly asserts that its Newark action involves a claim of more than $330,000,000. It subsumes it has a winner despite the fact that in recent years building-owner asbestos plaintiffs are encountering greater difficulty in establishing liability and damages. For asbestos to be harmful, it must be friable so that it can be inhaled. There is now some scientific opinion claiming that the odds of asbestos becoming friable are less than previously supposed and even when friable, its quantities in the air are not hazardous. Stated another way, there is continuing scientific debate over how much asbestos dust it takes to precipitate harm and what are the odds that commercial usage will precipitate asbestos dust.

These difficulty-of-proof factors were recognized by the Court when approving the *School Asbestos Litigation,* supra, settlement on September 13, 1995.

This Court considered Judge Giles' observations therein when we approved the second round of settlements on July 24, 1996.

Judge Giles had said:

> "There was great risk to the plaintiff-class if the case were to proceed. There were large school districts and others that opted out, there were trials. There was litigation by some or all of those opt-outs; *none was successful and there were verdicts in favor of the defendants.*" (Emphasis added)

Assuming the correctness of Judge Giles' statement, it is very possible to believe Pru would be better off as a member of the trial class in the instant case rather than pursuing its individual actions. Hence, even if plaintiffs' counsel and/or this Court had known of Pru's Newark lawsuits (which they did not) on July 24, 1996 it would not have caused us to reject the settlements on the ground of inadequacy.

Furthermore, it should be noted that when Mr. Gilson ostensibly drafted on May 10, 1995 Pru's request that it be allowed to participate in this case on an opt-in basis, Pru was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant.

Inappropriate Class Certification

In attacking the appropriateness of class certification, Pru apparently avers that there was not a pre-dominance of common questions. It lists 15 items which it says constitute "myriad" differences among class members. Pru's list is strikingly similar to that placed before the United States Fourth Circuit Court of Appeals in *Central Wesleyan College v. W.R. Grace Co., et al.*, supra. After due consideration of class member differences, the *Central Wesleyan* Court nevertheless conceded there were 8 predominating common factors, viz.

(1) whether defendants knew or had reason to know of the health hazards of asbestos (the "state of the art" issue); (2) whether certain categories of asbestos products (fireproofing, acoustical ceiling sprays, thermal insulation) are friable, or are capable of becoming friable as defined by federal regulations, and therefore, must at some time be removed; (3) whether defendants' asbestos products can release asbestos fiber in the course of foreseeable use, including maintenance, renovation and demolition; (4) whether defendants participated in conspiratorial activities, either industry wide or within segments of the industry; (5) whether defendants failed adequately to test their products for fiber release potential; (6) whether defendants failed to warn users of the potential hazards of their products; (7) whether defendants breached a duty of due care in selling friable asbestos products for use in colleges; and (8) whether defendants' conduct justifies the imposition of punitive damages.

This Court placed heavy reliance on *Central Wesleyan* when it decertified the original class of April 16, 1992 and established settlement and conditional trial classes per its Order of February 10, 1995, as amended February 17, 1995.

Pru also argues that when this Court certified the conditional trial class it either knew or should have known of the magnitude of Pru's Newark claim and its ability to assert it, and, therefore, should have ordered an opt-in rather than opt-out class. In support it cites Pa.R.C.P. 1711(b). Pa.R.C.P. 1711(b) provides that *if* the Court finds individual claims are substantial and the claimants have the resources to pursue them, then the court *may* require *all* class members to acquire membership via opt-in. Since this Court did not know of the existence of Pru's claims it could not have made the prerequisite finding for invocation of Rule 1711(b). Even had we known of Pru's claims we, nevertheless, could have proceeded on an opt-out basis in anticipation that Pru would

opt-out or remain in based on its perceived economic self-interest.

If we did not know, which we did not, then, Pru argues, this Court *should* have known and the lack of this information rendered ". . . the class certification defective."

Under this line of reasoning every Court managing a class action, as a condition precedent to class certification, would be required to investigate the magnitude of each class member's claim and his/her/or its resources to assert same. If that is true then class actions would no longer be viable law suits.

This Court doubts whether Pru can challenge the appropriateness of class certification post-judgment without giving notice to the rest of the trial class (at Pru's expense) so that members thereof would have an opportunity to defend this court's certification.

Inadequate Representation of Prudential

At page 28 of Pru's brief in support of its Petition for Reconsideration it offers another syllogism:

> "Defendant failed to advise plaintiffs class counsel of Prudential's existing lawsuit. Accordingly, plaintiff's class counsel was not aware of the nature and magnitude of Prudential's claims. Logically, therefore, plaintiff's class counsel could not adequately represent Prudential's interest since it did not even know what those interests were."

If the initial premise is conceded that the defendants were under a duty to advise plaintiff's class counsel then the syllogism is valid.

Contrary to Pru's assertion, defendants had no duty to advise plaintiffs' class counsel of anything pertaining to class representation if federal precedent cited above is meaningful. More particularly defendants had no duty to advise plaintiffs' counsel of Pru's pending lawsuit. Though not directly on point, the following cases augment what we said previously,

viz. that defendants have no duty to supplement class notice approved by the Court.

Georgine v. Amchem Products, Inc., 1994 WL 637404 at *12-13 (E.D. Pa. November 10, 1994), rev'd on other grounds 27 F.3d 1160 (3d Cir. 1995), *cert.* granted 117 S. Ct. 379 (1996); *In re: VMS Securities Litigation,* 1994 WL 386397 (N.D. III. July 20, 1994); *In re: VMS Limited Partnership Securities Litigation,* 1995 WL 355722 (N.D. Ill. June 12, 1995); See also 3B *Moore's Federal Practice* § 23.55 (2d ed. 1987); *In re: Prudential Securities Litigation*, supra.; and, both *Supermarkets General Corp. v. Grinnell Corp.*, supra.

If defendants have no duty to supplement class notice it follows they may rely on plaintiffs' counsel and ultimately, the Court, to effectuate the best practicable notice. Defendants have no independent duty and this Court will not impose it upon them.

Pru and Defendants Intended That Pru Opt Out

Elsewhere herein we have discussed with the question whether pending litigation by an absent class plaintiff bottomed on the cause of action asserted in the class action constitutes a constructive opt-out.

Pru has a variant on that theme, viz. because it and the trial class defendants were vigorously litigating they did not *intend* that Pru be bound by the Court's actions in this class action and, in particular, the entering of judgment against Pru.

No matter what the parties intended, such intent does not bind nor limit the Court in its plenary responsibility to determine class membership.

Such "intent" to exclude Pru from the plaintiff class may be an equitable factor weighing in favor of a late opt-out such as was sanctioned in *McCubbrey,* supra, but, as explained above, Pru's opting out in round one and being

aware of the pendency of the trial class were equitable factors now militating against late opt-out, especially when one considers public policy considerations favoring finality of judgments and fear of unraveling the settlements as discussed above.

Special Master's Actions

When appointing Daniel I. Murphy, Esquire on August 31, 1994 as a Special Master to "case manage" this matter, the Court ordered that:

> ". . . he may hold hearings and receive sworn testimony for review by the court [and he] . . . may, from time to time, apply to this Court for orders, decrees or rulings necessary to implement his commission, upon giving notice to interested parties."

Pru says the Special Master failed to notify it ". . . of the recommendations he made to the court, and the reasons for them . . ." when considering Pru's original Petition, its Supplemental Petition and its final Petition for Reconsideration.

Pru does not claim it was harmed in any way by the Special Master's alleged oversight. This, in and of itself, should dispose of this complaint.

Since, however, the Special Master's procedural correctness is being challenged, comment by this Court is appropriate.

Initially, we note that the relationship between this Court and the Special Master is such that he does not apply for anything in aid of his "Commission." His function is more that of a judicial assistant who reviews submissions by the parties and, in turn, provides precis of them to the Court. Thereafter, he may or may not recommend court action.

Of more importance, however, is the solicitude he showed for Pru in this matter. Pru had five bites at the apple, viz . . .

1. Its Brief in Support of its original petition which the Special Master digested.

2. Its Brief in Support of Its Supplemental Petition filed October 31, 1996. The Special Master digested this.

3. An oral argument of three hours duration on November 12, 1996 held before the Special Master.

4. Its letters of November 18, 25 and 26 constituting post-oral-argument facts and argument. The Special Master reviewed them.

5. Its Brief in Support of Its Petition for Reconsideration. The Special Master digested this.

It is beyond cavil for Pru now to contend that its failure to get a sixth bite at the apple harmed it.

Hunt Valley Marriott Status

In the Newark action Asbestospray, one of the four trial class defendants, has moved for summary judgment on the ground that the Hunt Valley Marriott which Pru owns or owned is included within the trial class plaintiffs because United States government agencies have used it for meetings, i.e., they were federal lessees. In the instant action, Pru asked for a contrary declaration, i.e., that the Hunt Valley Marriott is not within the certified trial class.

It is this Court's view that the Newark Court should be allowed the first opportunity to rule on this question but, if it declines to do so, this court will do so upon presentation of an appropriate record to it. As the Special Master advised the parties, determination of Hunt Valley Marriott's status probably turns on a lease-versus-license analysis. (Exhibit "C")

This Court has no record before it to enable it to make that determination. We do not know the dates of federal agency usage, the terms of federal agency usage, nor the

location of the Hunt Valley Marriott in order to apply the correct state's law as required by *Shutts,* supra.

Our main reason for deferring to the Newark Court, however, is articulated in *Langford v. Devitt,* supra. There the class member petitioner seeking and being denied late opt out had a pending Ohio state court action. The petitioner argued that the federal court where the class action was pending should allow late opt out because of the class settlement's effect in the Ohio action. The *Langford* Court concluded at page 45:

> "Although the Ohio Court cannot grant untimely exclusion from the class in the case at bar, the *effect* of this settlement on the Ohio action is for the Ohio court to determine." (Emphasis added)

As applied to the Hunt Valley Marriott, the Newark Court is free to determine the *effect* of our July 24, 1996 order terminating the confrontational aspect of this litigation. If it abstains, we will do so.

Accordingly, for the reasons set forth above, this Court's Order entered on November 27, 1996 should be affirmed and the appeal dismissed.

By the Court:

/s/ Bonavitacola, P.J.
Bonavitacola, P.J.

/s/ Daniel I. Murphy
Daniel I. Murphy, Esquire
Special Master

DATE: 3-26-97

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

PRINCE GEORGE CENTER, INC., On Behalf of Itself and All Others Similarly Situated	:	MAY TERM, 1986
	:	NO. 5388
v.	:	
U.S. GYPSUM CO., et al.	:	

SETTLEMENT CLASS EXCLUSION REQUEST

NOTE: If you wish to be excluded from the Settlement Class, you must sign and return this form by mail, postmarked on or before April 18, 1995.

DO NOT USE THIS FORM IF YOU WANT TO REMAIN A SETTLEMENT CLASS MEMBER

To: Joseph H. Evers
Acting Prothonotary
P.O. Box 59060
Philadelphia, PA 19102-9060

I acknowledge receipt of *"Notice of Proposed Settlements with Twenty-Four Defendants and Hearing to Approve These Settlements" to *all* private owners of buildilngs within the fifty states of the United States of America and the District of Columbia which were leased or subleased in whole or in part to the Federal Government or any agency, department

* but not service of; and without sufficient time to respond prior to April 28, 1995.

or unit thereof between May 30, 1984 and December 22, 1994 inclusive, in which building(s) asbestos or asbestos-containing materials were present. In response thereto, I elect to be excluded from the Settlement Class.

BY: Steven A. Lauer
Printed Name
Asst. General Counsel
Title
April 28, 1995
Date

The Prudential Insurance Company of America
Lessor to Federal Government
Law Department - 14th Floor,
751 Broad Street
Newark, N.J. 07102-3777
Address

(201) 802-3072
Telephone Number

/s/ Steven A. Lauer
Signature

EXHIBIT "B"

REDACTED
ATTORNEY-CLIENT PRIVILEGE

PRUDENTIAL RESERVES THE
ATTORNEY-CLIENT PRIVILEGE

VIA CERTIFIED MAIL R.R.R.

Mr. Joseph H. Evers
Acting Prothonotary
P.O. Box 59060
Philadelphia, PA

Re: Prince George Center, Inc. v. United States Gypsum Company, et al.
Court of Common Pleas of Philadelphia County
May Term, 1986 No. 5388

Dear Mr. Evers:

Recently a Notice regarding the above-referenced matter was sent to an office of the Prudential Insurance Company of America ("Prudential"), located in Dallas, Texas. The Notice made reference to certain "conditionally certified" classes. Included with the Notice papers was a "Settlement Class Exclusion Request" form. Prudential has already executed and submitted the Settlement Class Exclusion Request form.

I am writing this letter as a follow up to put you, the Court and counsel for the class on notice that Prudential does not wish to participate in any class or future class to be certified in the above-referenced matter *unless* I am contacted and Prudential states in writing that it will participate in such a class. I would appreciate it if you would make the appropriate record of Prudential's position. If there are any other entities or individuals whom I should notify regarding Prudential's position, please let me know.

Thank you for your anticipated cooperation. Should you have any questions, please feel free to contact me.

Very truly yours,

Steven A. Lauer

cc: Harvey S. Kronfeld
21 Bala Avenue
Bala Cynwyd, PA 19004
(via Certified Mail R.R.R.)

EXHIBIT "C"

First Judicial District of Pennsylvania
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

(LOGO)

ALEX BONAVITACOLA
PRESIDENT JUDGE
386 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-3770

November 5, 1996

Re: Prince George Center, et al. v. U.S. Gypsum, et al.
May Term, 1986 No. 5388

Dear Counsel:

Counsel for Grace asked that I consolidate or re-schedule the two conferences set for November 12. When scheduling those conferences, I had not had the opportunity to review Prudential's and Space Center Dallas' petitions nor defendants' responses thereto. Having now done so, I wish to advise you that one conference at 2:00 p.m. on November 12, 1996 in Conference Room 387 City Hall should be adequate for my purposes.

I would like, if possible, to supplement the record by noon on November 12, 1996 in the following ways:

1. Affidavits by counsel for or appropriate representatives off Grace and U.S. Gypsum stating:

a. The approximate or exact number of persons who as of July 8, 1996 were asserting in litigation building property damage asbestos claims against Grace or U.S. Gypsum, as the case may be.

b. If known, the number of such persons in 1(a) above who between May 30, 1984 and December 22, 1994 had federal tenants.

The reason for this request will be apparent when I discuss below the liberal/conservative dichotomy re late opt-outs set forth in *McCubbrey*.

2. Since the Prothonotary has returned to Mr. Kronfeld at least 1,787 mailed settlement notices which proved to be undeliverable by the Post Office, I would like his affidavit of record detailing how many of the seven notices mailed to various Prudential properties (five Prudential, one Pru or PIC and one 745) were returned. I realize under Pennsylvania law there is a presumption of delivery once a letter enters the postal stream but I do not want to rely on that.

3. Grace claims Edward Westbrook knew or should have known via discovery in the Space Center Dallas, Inc. litigation that there was a federal tenant at 1111 W. Mockingbird Lane, Dallas, TX between May 30, 1984 and December 22, 1994. That discovery may be among the multifarious exhibits piled high in our chambers but I do not propose to find the needle. Hence, via affidavit from Grace's counsel, I would like this discovery placed of record so that, in the event of an appeal, it would be a part of the record.

There is a question whether Hunt Valley Marriott had a federal tenant, and, therefore, is a member of the Trial Class. I suspect this will involve a lease-versus-license analysis. Prudential has asked this Court to "declare" that there was no federal tenant whereas Asbestospray has asked the federal court in Newark to find the opposite. I am recommending to Judge Bonavitacola that this Court defer to Newark and not rule on the request unless Judge Ackerman declines to do so. I fear there could be inconsistent finding. (My hunch is the federal government's holding conferences at Hunt Valley falls into the "license" rather than "lease" category.)

At our conference, I want to focus on two areas.

(Preliminarily, let me note I will advise Judge Bonavitacola that, in my view, the "best practicable" notice requirements of *Shutts* have been met.)

1. Permitting Space Center Dallas and/or Prudential to avoid the judgment of August 13, from a substantive standpoint, amounts to a setting aside or opening of that judgment regardless of the legal label or method employed.

Prudential argues that the judgment against it is analogous to a default judgment which, under Pennsylvania law, can be *opened* if Prudential can offer a reasonable explanation or excuse for not opting out. Query: Is this a valid analogy in a class action context where the rights of thousands of class members allegedly could be adversely affected by initiating what could be a series of judgement reversals? Also under Pennsylvania law to *set aside* a judgment requires a fatal defect or irregularity appearing on the face of the record. More specifically, as stated in *Flynn v. Casa DiBertacchi Corp.*, 674 A.2d 1099 (1996) at page 1105:

"A judgment is void on its face if one or more of three jurisdictional elements is found absent: jurisdiction of the parties; subject matter jurisdiction; or the power or authority to render the particular judgment. (Citing cases)"

Query: Is there an irregularity on the face of the *Prince George* record.

2. *McCubbrey* references a conservative/liberal dichotomy when it comes to permitting late opt-outs.

The conservative view is that deviation from exclusion procedures will erode the finality of complex adjudications (including fund distribution) and discourage class action settlements. I would like the defendants to set forth at our meeting both general policy reasons and the pregmatics of

the *Prince George* case which would warrant adoption by this Court of this conservative view.

The liberal view, per *McCubbrey,* is that any reasonable expression of a request for exclusion (e.g., pending litigation) should serve to relieve a class member from a class suit. I would like counsel for Prudential and Space Center Dallas, Inc. to advance policy reasons and the pregmatics of this case which would warrant the Court's adopting this liberal view.

You can work on the premise I have read all briefs but not their accompanying exhibits.

Sincerely yours,

/s/ Daniel I. Murphy
Daniel I. Murphy
Special Master

/cs

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

ORDER

AND NOW, this 27th day of November, 1996 upon consideration of Prudential Insurance Company of America's petition filed September 30, 1996 for declaration that it is not a class member and not bound by this Court's judgment of August 13, 1996 or, alternatively, for *nunc pro tunc* ruling that its September 20, 1996 opt-out from the Trial Class filing was timely, defendants' responses filed thereto, Prudential's supplemental petition filed October 30, 1996 as well as various affidavits filed of record at the request of Special Master Daniel I. Murphy and following a lengthy conference with all counsel before the Special Master on November 12, 1996, it is hereby **ORDERED** and **DECREED** that Prudential's Petition and supplement thereto are **DENIED.**

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.
/s/ Daniel I. Murphy
DANIEL I. MURPHY, SPECIAL MASTER

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

ORDER

AND NOW, this 17th day of December, 1996, Prudential Insurance Company's Petition for Reconsideration and Clarification filed December 10, 1996 is **DENIED.**

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

FINAL ORDER AND JUDGMENT APPROVING SETTLEMENTS WITH U.S. GYPSUM COMPANY, W.R. GRACE & CO.-CONN., UNITED STATES MINERAL PRODUCTS COMPANY AND ASBESTOSPRAY CORPORATION

WHEREAS, Prince George Center, Inc. ("PGC") and MBL Life Assurance Corporation ("MBLLAC") (collectively the "Named Plaintiffs") and Defendants United States Gypsum Company ("U.S. Gypsum"), W.R. Grace & Co. - Conn. ("Grace"), United States Mineral Products Company ("U.S.Mineral") and Asbestospray Corporation ("Asbestospray") (collectively "Remaining Defendants") have entered into Settlement Agreements with respect to the claims of all members of the certified Trial Class (hereinafter, the "Settlements");

WHEREAS, the Court defined the Trial Class in its Order dated February 17, 1995, as amended on February 23, 1996, as follows:

> All private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or sub-leased their building(s) in whole or in part to the United States or any agency thereof; and (2) at any time during that period their

building(s) contained asbestos or asbestos product(s); and (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by United States Gypsum Co., W.R. Grace & Co., U.S. Mineral Products Co., and/or Asbestospray Corp., or their building(s), is/are in a State whose law permits an owner to establish joint and several liability for conspiracy or concert of action against not only the maker or seller of asbestos or asbestos product in his/her/its building(s), but also others who acted in conspiracy or concert with him/her/it to misrepresent or withhold from the public knowledge of the hazards of asbestos;

WHEREAS, this Court on April 24, 1996 and May 6, 1996 directed that notice be given to the Trial Class regarding the Settlements; and approved the forms and methods of publication of notice to be given Class Members about their right to opt out or object, and the scheduling of a hearing to determine whether the Settlements should be approved as fair, reasonable and adequate and to hear any objections thereto;

WHEREAS, Notice of the Settlements was sent by first-class mail to all known potential members of the Trial Class with deliverable addresses and a short form of such Notice was published in nine major daily newspapers, on a internet web site and in five selected real estate trade publications, advising all members of the Trial Class of their right to appear at the hearing in support of or in opposition to the proposed Settlements;

WHEREAS, plaintiffs' counsel has filed and served a complete list of all persons or entities to which Notice was mailed and the Prothonotary has filed a complete list of all persons or entities that have filed timely requests for exclusion;

WHEREAS, a hearing was held, as noticed on 7-23, 1996 to determine whether the Settlements should be approved and, prior to the hearing, proof of mailing and

publication of notice of the proposed Settlements was presented and filed.

WHEREAS, the Court has heard counsel on behalf of the parties wishing to be heard to determine whether the Settlements should be approved; and

WHEREAS, the Court has reviewed all of the submissions presented with respect to the proposed Settlements.

NOW, THEREFORE, on this 23rd day of July, 1996, it is hereby **ORDERED, ADJUDGED** and **DECREED** that

1. The term the "Named Plaintiffs" as used herein shall mean Prince George Center, Inc., and MBL Life Assurance Corporation.

2. "Grace" as used herein shall mean W.R. Grace & Co.— Conn., a Connecticut Corporation, and W.R. Grace & Co., a New York Corporation, and their predecessors, successors, assigns (including the purchasers of any of their divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present.

3. "U.S. Mineral" shall mean United States Mineral Products Company, a New Jersey Corporation, and its predecessors and successors, past and present assigns (including the purchasers of any of its divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present, but only in their capacity as such in their relationship to United States Mineral Products company and not including any other defendant remaining in this litigation.

4. "U.S. Gypsum" shall mean United States Gypsum Company, its predecessors, successors, assigns (including the

purchasers of any of its former divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present.

5. "Asbestospray" shall mean Asbestospray Corporation, its predecessors and successors, and past and present assigns (including the purchasers of any of its former divisions and subsidiaries), divisions, affiliates, parents, partnerships and partners and Asbestos Products Manufacturing Corporation, Spraycraft Corporation and H&A Construction Corporation, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present, but only in their capacity as such in relationship to Asbestospray Corporation or its majority stockholder, and not including any other defendant remaining in this litigation.

6. The term "Claims" as used herein shall mean all claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known and unknown, legal or equitable, arising out of or relating to the manufacture, sale, installation or use of asbestos-containing materials, friable or non-friable, including but not limited to all direct-to-steel fireproofing, acoustical plasters, fireproofing plasters, thermal insulation, ceiling tile, texture paints, textures, paste-spackling putties, pipe coverings, joint compounds, rigid block insulation, siding shingles, roofing products or any other asbestos-containing products manufactured by or under license from the Remaining Defendants or any of them, which contain asbestos, which the Named Plaintiffs and members of the Trial Class individually or collectively, and their predecessors or successors, transferees and assigns, or any of their past or present representatives, assignees, subsidiaries, division, affiliates, parents, partners, officers, directors, employees or agents, had, now have or hereinafter may have against Remaining Defendants from the beginning

of the world whether now existing or which may arise in the future by reason of alleged asbestos-containing material installed in Class Buildings, or any alleged contamination such material may have created or will create. The term "Claims" shall also include all claims arising out of or in any way related, in whole or in part, to facts, matters, acts of commission or omission, statements, agreements or occurrences which were or could have been asserted, alleged, described, embraced or otherwise referred to in any of the complaints and amended complaints in this action, including all claims relating to costs of inspection to determine whether such asbestos-containing materials were present, all claims relating to the costs of medical monitoring (except as a part of a course of treatment of a person who has been injured by exposure to asbestos), and all claims of conspiracy or concert of action or any other type of shared liability for asbestos-contain materials manufactured, sold or installed by other persons, *provided, however*, that the term the "Claims" does *not* include any rights the Named Plaintiffs, the Trial Class or the remaining defendants may have now or in the future concerning any claims for personal injury caused by asbestos or asbestos-containing building products in any Buildings.

7. "Class Buildings" means any building owned by the Named Plaintiffs, or any Member of the Trial Class and falling within the definition of the Trial Class as set forth above.

8. The bringing, pendency or settlement of this action shall have no effect on any buildings owned or operated by Class Members other than their Class Buildings.

9. The members of the Trial Class as defined by this Court's Order of February 17, 1995 as amended on February 23, 1996 who have not timely filed elections to exclude themselves ("Final Trial Class") are subject to personal jurisdiction of this Court for the purposes of effectuating these Settlements.

10. The Settlements are in all respect fair, adequate, reasonable and proper, are in the best interests of the Trial Class, and are approved fully.

11. The Court reaffirms the findings in paragraph 5 of the Court's February 17, 1995 Order, in which the Court concluded that, as to W.R. Grace & Co.-Conn, U.S. Gypsum, U.S. Mineral and Asbestospray, the prerequisites to a Class Action described in Pa.R.Civ.P. § 1702 have been satisfied, that the Named Plaintiffs including MBLLAC are adequate representatives of the Trial Class, and that their claims are typical of the claims of the Trial Class.

12. Notice of the proposed Settlements, as required by the Court, constitutes the best notice practicable under the circumstances and has been given in an adequate and sufficient manner, complying in all respects with applicable law, constitutional due process and in particular the Court's Orders and Pa.R.Civ.P. 1712 and 1714(c).

13. This Class Action and the Claims which were actually asserted or which could have been asserted in the Named Plaintiffs' Complaints and any amendments thereto are dismissed on the merits and with prejudice against Named Plaintiffs and the members of the Trial Class, and in favor of Remaining Defendants, without costs to any party.

14. Named Plaintiffs and each and every member of the Trial Class are deemed to have released their Claims, defined in paragraph 6 hereof, against Remaining Defendants as if they had individually executed the Release attached as an Exhibit to each Settlement Agreement and to the Class Notice, which is incorporated herein by reference and made a part hereof.

15. The members of the Trial Class as certified by this court's Order February 17, 1995, as amended on February 23, 1996, who timely filed elections to exclude themselves from the Trial Class shall not participate in the proceeds of

the Settlements hereby approved or receive any benefit thereunder.

16. U.S. Gypsum, Grace, U.S. Mineral and Asbestospray are forever released and discharged from any and all liability to the Named Plaintiffs and to any member of the Trial Class with respect to any and all Claims.

17. Subject to paragraphs 18 and 19 below and the provisions in the Settlement Agreements regarding claims for contribution and/or indemnity, this Order and the Settlements are not intended and are not to be construed as a release, dismissal or discontinuance by Named Plaintiffs and/or any Class members of any claims which any of them has or may have against any other entity or person.

18. In the event either Named Plaintiff or any member of the Trial Class commences an action against any person or entity for damages relating to the presence of asbestos in a building and the person or entity, in turn, asserts a claim for contribution or indemnity against any of the Remaining Defendants, then the plaintiff in such suit shall reduce any judgment it may obtain against any other person for asbestos-related property damage by the amount, percentage or share of such judgment attributable to the Remaining Defendants so as to bar, discharge and release under applicable law any claims for contribution or indemnity against Remaining Defendants.

19. In the event that either Named Plaintiff or any member of the Trial Class obtains a judgment against any other person for asbestos-related property damage and that person obtains a judgment over, in whole or in part, against any Remaining Defendant for contribution or indemnity, then such plaintiff shall reduce or remit any judgment or portion thereof obtained from such person by the amount of the judgment over against U.S. Gypsum, Grace, U.S. Mineral, and/or Asbestospray.

20. This Court retains jurisdiction of this matter for the purposes of ascertaining that all parties perform and discharge their obligations under the Settlement Agreements and enforcement thereof, and for the purposes of determining challenged claims, allowing administration or other expenses, making awards, including attorneys fees and expenses, distributing all settlement funds or recoveries, and any other matter incident to the administration of this action.

21. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Court Order, and the Prothonotary of this Court is directed to enter this Final Order and Judgment forthwith pursuant to Pa.R.Civ.P. 1715. Judgment is hereby entered in favor of U.S. Gypsum, Grace, U.S. Mineral and Asbestospray and against the Named Plaintiffs and the members of the Final Trial Class. The Court has made an express determination that an immediate appeal would facilitate resolution of the entire case.

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.

September 13, 1996

VIA FACSIMILE AND FEDERAL EXPRESS

Robert J. Gilson, Esq.
Riker, Danzig, Scherer, Hyland & Perretti
One Headquarters Plaza
Morristown, NJ 07962-1981

Re: The Prudential Insurance Company of America v. United States Gypsum Company, et al.
Civil Action Nos. 87-4227 and 87-4238 (HAA) (D.N.J.)

Dear Mr. Gilson:

With pretrial dispositive motions due on or before October 1, 1996, we are writing to you on behalf of W.R. Grace & Co.-Conn. and United States Gypsum Company to confirm that at the present time, and based on present information, the following are the only buildings at issue in this litigation.

Buildings at issue against W.R. Grace & Co.-Conn.:

Century Center I - Atlanta, Georgia

Southdale Office Complex - Edina, Minnesota

Embarcadero II - San Francisco, California

Short Hills Office Building - Short Hills, New Jersey

Brookhollow - Houston, Texas

Northwest Financial Center - Bloomington, Minnesota

1100 Milam - Houston, Texas

Buildings at issue with respect to U.S. Gypsum:

Chatham Center - Pittsburgh, Pennsylvania

Prudential Plaza Mall - Newark, New Jersey

The other buildings are no longer at issue based on the Final Judgment Order and Release in the *Prince George Center v. U.S. Gypsum, et al.*, CCP Phila. Cty., May Term 1986, No. 5388, copies of which are enclosed. Prudential is a member of the class in the *Prince George Center* case.

If your understanding is other than as set forth above, please advise us no later than September 18, 1996. In the meantime, and only to avoid any prejudice to our respective clients, we will serve outstanding expert reports and continue discovery in accordance with the Pre Trial Order.

Very truly yours,

ANTHONY J. MARCHETTA
Attorney for W.R. Grace &
Co.-Conn.

KELL M. DAMSGAARD
Attorney for United States
Gypsum Company

Encls.
cc: All Counsel of Record